Writ of Error dismissed for want of prosecution. Apr 15

Judge Davis

Judge Clifford

Dunk

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 291.

WILLIAM A. SIMPSON, PLAINTIFF IN ERROR,

vs.

C. S. GREELEY, W. M. McPHERSON, S. M. EDGALL, E. MILLER, M. BAIRD, R. M. SHOEMAKER, AND J. W. KINNEY, (PARTNERS AS SHOEMAKER, MILLER & CO.,) D. ACKERS, W. R. SMITH, GEORGE ARBOLD, H. JOHNSON, A. BARRETT, A. V. EXCENDINE, J. LEON, AND J. H. COCHRAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED NOVEMBER 29, 1872.

Oct. Term 1873

UNIVERSITY OF CALIFORNIA
LIBRARY

SUPREME COURT OF THE UNITED STATES.

No. 291.

WILLIAM A. SIMPSON, PLAINTIFF IN ERROR,

vs.

C. S. GREELEY, W. M. McPHERSON, S. M. EDGALL, E. MILLER, M. BAIRD, R. M. SHOEMAKER, AND J. W. KINNEY, (PARTNERS AS SHOEMAKER, MILLER & CO.,) D. ACKERS, W. R. SMITH, GEORGE ARBOLD, H. JOHNSON, A. BARRETT, A. V. EXCENDINE, J. LEON, AND J. H. COCHRAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

	Original.	Print.
Bond	1	1
Writ of error	4	2
Citation and service	8	2
Petition in error	10	3
Petition of defendants	57	19
Petition amended	62	21
Answer	67	22
Replication	97	32
Offer of evidence	113	37
Findings of fact	197	130
Conclusions of law	231	140
Motion to set aside	234	141
Order of court	238	142
Judgment	240	142
Proceedings in supreme court—State	246	144
Judgment of supreme court	249	146
Opinion	252	146
Mandate	272	147
Clerk's certificate	273	152
Assignment of errors	274	153

1 Supreme Court of the United States.

WILLIAM A. SIMPSON, PLAINTIFF IN ERROR,
vs.
C. S. GREELEY, S. M. EDGELL, WILLIAM M. McPherson, Robert E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker, and J. W. Kinney, partners as Shoemaker, Miller & Co., David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, defendants in error.

Know all men by these presents, that we, William A. Simpson, Henry M. Simpson, S. N. Simpson, P. D. Ridenour, of Lawrence, in the State of Kansas, are held and firmly bound unto the said C. S. Greeley, S. M. Edgell, William M. McPherson, Robert E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker, J. W. Kinney, David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, in the sum of twenty thousand dollars, to be paid to them, their executors or administrators;
2 to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this third day of January, A. D. 1872.

Whereas the above-bounden William A. Simpson hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is such, that if the above-named William A. Simpson shall prosecute his said writ of error to effect and answer all costs and damages, if he shall fail to make good his pleas, then this obligation shall be void; otherwise to remain in full force and virtue.

WM. A. SIMPSON. [SEAL.]
HENRY M. SIMPSON. [SEAL.]
S. N. SIMPSON. [SEAL.]
P. D. RIDENOUR. [SEAL.]

(Endorsed:)

STATE OF KANSAS, *Supreme Court, ss:*

I hereby approve the within bond this 3d day of January, A. D. 1872.

SAMUEL A. KINGMAN,
Chief Justice Sup. Court.

Filed Jan. 3d, 1872.

A. HAMMATT, *Clerk.*

3 STATE OF KANSAS,
Supreme Court, ss:

I certify that the above and foregoing is a true copy of the bond filed in my office by the plaintiffs in error in the above-entitled case. Witness my hand and official seal hereto affixed this the 3d day of January, A. D. 1872.

[SEAL.]

A. HAMMATT,
Clerk Sup. Court of Kansas.

4 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the hon. the judges of the supreme court of the State of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said State in an action between William A. Simpson, plaintiff, and C. S. Greeley, S. M. Edgell, William M. McPherson, Robert E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker and J. W. Kinney, partners as Shoemaker, Miller & Co., David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, defendants, wherein was drawn in question the construction of a treaty and also a statute of the United States, and the decision was against the right, title, and authority specially set up and claimed by said plaintiff under such treaty and statute, a manifest error hath happened to the
5 great damage of the said William A. Simpson, as by by his complaint appears: We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held; that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the second day of January, in the year of our
6 Lord one thousand eight hundred and seventy-two.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas within the 8th Circuit.

STATE OF KANSAS,
Supreme Court, ss:

This writ of error is allowed this the 2d day of January, A. D. 1872, by the supreme court of the State of Kansas.

SAMUEL A. KINGMAN,
Chief Justice Sup. Court of Kansas.

7 (Indorsed:) W. A. Simpson *vs.* C. S. Greely et al. Writ of error. State of Kansas, supreme court, ss. Filed herein Jan. 2d, 1872. A. Hammatt, cl'k sup. court.

8 UNITED STATES OF AMERICA, *ss:*

To C. S. Greeley, S. M. Edgell, William M. McPherson, Robert E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker, and J. W. Kinney, partners as Shoemaker, Miller & Co., David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein William A. Simpson is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel A. Kingman, chief justice of
9 the supreme court of the State of Kansas, this 2nd day of January, in the year of our Lord one thousand eight hundred and seventy-two.

SAMUEL A. KINGMAN,
Chief Justice.

STATE OF KANSAS,
Shawnee County, ss:

W. W. Nevison, being first duly sworn, says that, on the 2d day of January, A. D. 1872, he delivered to Thomas Freelon and R. Crogen, attorneys of record for the within-named defendants in error, a true copy of the within citation, and, at the same time, exhibited to them the within citation.

W. W. NEVISON.

Sworn to before me and signed in my presence this 2d day of January, A. D. 1872.

SAM'L A. KINGMAN,
Ch. Justice.

(Indorsed:) William A. Simpson *vs.* C. S. Greeley et al. Citation. Filed Jan. 2, 1872. A. Hammatt, clerk supreme court. Filed Jan. 2, 1872. A. Hammatt, clerk supreme court.

10 Pleas had in the supreme court in the State of Kansas, at its regular July session, held in the supreme court rooms, on and from the day of July, A. D. 1871. Present at said court: Hon. S. A. Kingman, C. J.; Hon. D. M. Valentine, J.; Hon. D. J. Brewer, J.; A. Hammatt, esq'r., clerk.

Be it remembered that heretofore, to wit, on the 16th day of November, A. D. 1870, William A. Simpson filed in said supreme court his certain petition in error, and transcript and record of the proceedings of the first judicial district court, sitting within and for Leavenworth County in the State of Kansas, against C. S. Greeley, S. M. Edgall, William M. McPherson, Robert E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker, and J. W. Kenney, partners as Shoemaker, Millar & Co., David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, of which petition in error the following is a true copy, to wit:

Petition in error.

THE STATE OF KANSAS, *ss:*

In the supreme court of the State of Kansas.

WILLIAM A. SIMPSON, PLAINTIFF IN ERROR,
vs.
C. S. GREELEY, S. M. EDGELL, WILLIAM M. McPherson, Robert E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker, and J. W. Kenney, partners as Shoemaker, Millar & Co., David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, defendants in error.

The said William A. Simpson, the plaintiff herein, complains of the said C. S. Greeley, S. M. Edgell, William M. McPherson, Robert E. Carr, Edward Millar, Matthew Baird, R. M. Shoemaker, and J. W. Kenney, partners as Shoemaker, Millar & Co., David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, the defendants herein, for that the said defendants, C. S. Greeley, S. M. Edgell, William M. McPherson, Robert E. Carr, Edward Miller, Mathew Baird, R. M. Shoemaker, and J. W. Kenney, partners as Shoemaker, Millar & Co., at the September term of the district court of the first judicial district of the State of Kansas, sitting in the county of Leavenworth, in the year A. D. 1870, recovered certain judgements by the consideration of said court
12 against said plaintiff, William A. Simpson, and said defendants David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran; and also a certain judgment against said William A. Simpson, all in a certain action then pending in said court, wherein said defendants, C. S. Greeley, S. M. Edgell, William M. McPherson, Robert E. Carr, Edward Millar, Matthew Baird, R. M. Shoemaker, and J. W. Kenney, partners as Shoemaker, Miller & Co., were plaintiffs, and the said William A. Simpson, David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran aforesaid, were defendants. An original case made, in which said action is herewith filed, hereto annexed and made part hereof, and marked "Exhibit A." And said William A. Simpson avers that the consent of said David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, or any of them, cannot be obtained to join the said Simpson in this proceeding in error, nor can the consent of any of them be obtained to attempt to reverse any of the said judgments, or to prosecute any suit or proceeding therefor.

And the plaintiff herein avers that there is error in the said record and proceedings, and in the record of said action, and in the pro-
13 ceedings therein, and in the record and proceedings shown in and by said case made as aforesaid, in this, to wit:

That the said court erred in giving leave to the plaintiffs in said action, the defendants herein, C. S. Greeley, S. Edgell, William M. McPherson, Robert E. Carr, Edward Millar, Matthew Baird, R. M. Shoemaker, and

J. W. Kenney, to amend their petition in said action by interlining the same.

That the said court erred in overruling the motion of the defendants in said action, said William A. Simpson, David Ackers, William R. Smith, Geo. Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, to strike said petition from the files of said court.

That the said court erred in admitting certain evidence in the trial of said action, against the objection of the defendants therein, the said William A. Simpson, David Ackers, William R. Smith, Geo. Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran.

That the said court erred in the trial of said action in excluding certain evidence offered by the defendants therein, the said William A. Simpson, David Ackers, William R. Smith, George Arbold, H.
14 Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran.

That the said court erred in its conclusions of fact found in making the same as it did.

That the said court erred in refusing to find other conclusions of fact than there by it found.

That the said court erred in not finding other conclusions of fact than it did.

That the said court erred in its several conclusions of law in said action.

That the said court erred in overruling the motion of the defendants in said action, the said William A. Simpson, David Ackers, William R. Smith, Geo. Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, to vacate the decision of the court and to grant a new trial in said action.

That the said court erred in refusing to vacate its decision in said action, and in refusing to grant a new trial therein, and in overruling the motion of the said defendants therein, the said William A. Simpson, David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew
15 Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, for a new trial of said action.

The said court erred in refusing to vacate and set aside its findings, conclusions of fact, decision, and conclusions of law, made in said action, and in overruling the motion therefor, and for a new trial of said action made in said action by the defendants therein, the said William A. Simpson, David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran.

That the said court erred in said action in and by its first conclusion of law therein, and by making the same.

That the said court erred in said action in and by concluding, as matter of law, that the defendants therein, the said William A. Simpson, David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, were not entitled to any relief on the claim of right and title set up and asserted by them in said action.

That the said court erred in said action in and by its second conclusion of law therein, and by making the same.

16 That the said court erred in said action in and by concluding as matter of law that the defendants herein, C. S. Greely, S. M. Edgell, William M. McPherson, Robert E. Carr, Edward Miller, Matthew

Baird, R. M. Shoemaker, and J. W. Kenney, had the legal title to, and were entitled to the possession of, the lands described in their petition in said action.

That the said court erred in said action in and by its third conclusion of law therein, and by making the same.

That the said court erred in said action in and by concluding as matter of law that the defendants herein, C. S. Greely, S. M. Edgell, William M. Pherson, Robert E. Carr, Edward Millar, Matthew Baird, R. M. Shoemaker, J. W. Ken'edy, were entitled to a judgment against the aforesaid William A. Simpson for the sum of four thousand and three hundred dollars, and in and by its conclusions of law made in said action to that effect.

And that said court erred in said action in and by concluding as matter of law that the defendants herein, C. S. Greely, S. M. Edgell, William M. McPherson, Robert E. Carr, Edward Millar, Matthew
17 Baird, R. M. Shoemaker, and J. W. Kenn'y, were entitled to a judgment against the aforesaid David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, defendants herein, for $2,600, and in and by its conclusion of law to that effect made in said action.

That the said court erred in rendering the above-mentioned judgments.

That the said court erred in rendering the judgments it did in said action render against the said William A. Simpson, David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, and in rendering either of them.

That the said court erred in rendering the judgments it did render against William A. Simpson in said action, and in rendering either of them.

That the said court erred in not rendering judgment in said action in favor of the said William A. Simpson, David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, the defendants therein.

18 That the said court erred in said action on the trial thereof in its rulings and decision in relation to admitting and excluding evidence to which the defendants therein excepted, as shown by the case made as aforesaid.

That the said court erred in ruling out the evidence offered by the defendants in trial thereof.

That the said court erred in rendering the judgments aforesaid in said action when it ought to have rendered judgment in favor of the defendants therein and against the plaintiffs therein.

That the said court erred in and by rendering judgment in favor of the plaintiffs therein in said action against the defendants therein, or any of them.

That the said court erred in said action and in and by making the various and several rulings and decisions therein, which are shown by said case made, to which the defendants in said action excepted, as shown in and by the case made in said action as aforesaid.

The said court erred in said action in and by making rulings and decisions therein, to which the defendants therein excepted, all which is shown by the case made as aforesaid, and the statements in the
19 same showing the several rulings and decisions of said court in said action, to which the defendants therein excepted, and now here severally referred to as part thereof.

And that said court erred on said trial of said action in this, to wit, that when plaintiffs in said district court offered in evidence the certificate of record of said patent in the office of the register of deeds of said Leavenworth County, which certificate was dated April 9th, A. D. 1868, and defendants in said district court objected to the said certificate of record being read in evidence because the defendants demanded copies of all the papers plaintiffs in said district court proposed to offer in evidence, and this paper had not been so furnished as demanded, said objection was by the court overruled, and the said certificate read in evidence.

And that said court erred in said trial of said action in this, that when defendants in said district court asked of the witness Caldwell the following question, which appears on page 7 of the printed evidence offered at said trial, "Were you, in October, 1867, at the time you paid this money, acquainted with the value of the land described in this patent?" and the plaintiffs in said district court objected thereto as immaterial, and not a proper cross-examination, said objection was by the court sustained.

And that said court erred in the trial of said action in this, that when defendants in said district court asked said witness Caldwell the following question, (which appears on page 7 of said printed evidence,) "Who were the directors from January, 1866, to the time the money was paid to the Government of the United States for the land specified in this patent?" and the plaintiffs in said district court objected thereto as incompetent and not proper cross-examination, the said objection was by said court sustained.

And that said court erred in the trial of said action in this, that when defendants in said district court asked said witness Caldwell the following question, (which appear' on page 7 of said printed evidence,) "Were any other persons acting as directors of Missouri River Railroad Company from January, 1866, to October, 1867, other than the persons you have already named as being directors of the company during that time?" and the plaintiff in said district court objected thereto as incompetent, and not proper cross-examination, said objection was by the court sustained.

And that said court erred in the trial of said action in this, that when plaintiffs in said district court asked of the witness, Samuel N. Simpson, the following question, (which appears on page 10 of said printed evidence,) "Describe it," and defendants in said district court objected thereto as not cross-examination, said objection was by the said court overruled.

And that said court erred in the trial of said action in this, that when the following question (which appears on page 11 of said printed evidence) was asked of said witness, Samuel N. Simpson, "Was that paper that L. T. Smith gave you ever in the hands of Judge Crozier?" and the said defendants in said district court objected, because the same was not cross-examination, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked of the witness, Samuel N. Simpson, this question, (which appears on page 11 of said printed evidence,) "When was it in his hands?" and the defendants in said district court objected to the same as not being cross-examination, and because the time is not confined to the time since the witness had it, the said objection was by the said court overruled.

And that the said court erred in the trial of this action in this,

that when plaintiffs in said district court asked of the witness, Samuel N. Simpson, this question, (which appears on page 11 of said printed evidence,) "State whether it did not remain in his hands till long after the 24th day of May, 1867, and defendants in said district court objected as immaterial and not a cross-examination, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when defendants in said district court asked of the witness, Samuel N. Simpson, the following question, (which appears on page 11 of said printed evidence,) "State if L. T. Smith signed more than one deed that would come anywhere near answering the terms of this paper you looked at," and the plaintiffs in said district court objected to the same as incompetent and irrelevant, the said objection was by *by* the court sustained.

And that the said court erred in the trial of this action in this, that when defendant in said district court asked of the witness, Sam'l N. Simpson, the following question, (which appears on page 11 of said printed evidence,) "Did L. T. Smith, in your presence, sign any other paper similar to this at any other time?" and the plaintiffs in
23 said district court objected to the same as incompetent and irrelevant, said objection was by the court sustained.

And that the said court erred in the trial of this action in this, that when defendant in said district court asked witness William A. Simpson the following question, (which appear' on page 12 of said printed evidence,) "Look at this paper, (showing the copy offered in evidence,) and state if you ever saw a paper in form and language similar to this one, previous to the words of the certificate?" and plaintiffs in said district court objected to the same as incompetent and immaterial, said objection was by the court sustained.

And that the said court erred in the trial of this action in this, that when defendants in said district court offered in evidence the original record of the conveyance of the lands in dispute from Samuel N. Simpson to William A. Simpson, dated May 28th, 1867, on pages 109 & 110 of record 16 of conveyances of the office of register of deeds, Leavenworth County, and plaintiffs in said district court objected as incompetent, the court sustained said objection.

And that the said court erred in the trial of this action in this,
24 that when plaintiffs in said district court asked the witness, William A. Simpson, the following question, (which appears on page 19 of said printed evidence,) "How did the debt of about $2,000 originate, how did it get on Simpson Brothers' books, when and for what consideration?" and defendants objected to the same as incompetent, said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, William A. Simpson, the following question, (which appears on page 19 of said printed evidence,) "Had he any property that he claimed in his name that was subject to execution?" and defendant in said district court objected because it calls for a conclusion as to real estate which is shown in writing, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, William A. Simpson, the following question, (which appears on page 19 of said printed evidence,) "Did you know that it would be important to prove that when you came over here?" and the defendant in said district court objected to the same as incompetent, the said objection was by the court overruled.

25 And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, William A. Simpson, the following question, (which appears on page 20 of said printed evidence,) "What did you understand about if he did not get certain lands he was to have certain others?" and the defendant in said district court objected to the same as immaterial, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked of the witness, William A. Simpson, this question, (which appears on page 21 of said printed evidence,) "Were it not on the Leavenworth & Lawrence road?" and the defendants in said district court objected to the same as irrelevant, and not cross-examination, that the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when the court asked the witness, William A. Simpson, the following question, (which appears on page 22 of said printed evidence,) "Was it part of what is known as the Sarcoxce tract of land?" and defendant in said district court objected to the court asking any questions,

26 and as incompetent, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the said witness, William A. Simpson, the following question, (which appears on page 22 of said printed evidence,) "Did you go to make enquiries or observations to see if any persons were in possession of the property at the time you bought it?" and defendant in said district court objected as incompetent, irrelevant, and not cross-examination, said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the said witness, William A. Simpson, the following question, (which appears on page 23 of said printed evidence,) "Were the checks drawn on the bank?" and the defendants in said district court objected to said question as incompetent, the check' will show for themselves, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when the plaintiffs in said district court asked the witness, William A. Simpson, the following question, (which appears on page 23 of

27 said printed evidence,) "In whose favor?" and defendants in said district court objected thereto as incompetent, and because the books will show for themselves, if produced, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, William A. Simpson, the following question, (which appears on page 25 of said printed evidence,) "What business were Shoemaker, Miller & Co. engaged in?" and the defendant in said district court objected as incompetent, and not cross-examination, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, William A. Simpson, the following question, (which appears on page 26 of said printed evidence,) "Do you know whether that was the time the injunction was obtained to restrain the cutting of timber?" and defendants in said district court objected to the same as incompetent, and because the papers will show, if produced, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when the defendants in said district court offered in evidence the
28 deposition of E. M. Bathalow, which appears on pages 28, 29, 30, 31, 32, and 33 of said printed evidence, and it was admitted that the said Bathalow was at the time of said trial a resident of Lawrence, Douglas County, and was at the time the deposition was taken, and that he was present in court at the time the deposition was offered, whereupon plaintiffs in said district court objected to the reading thereof, was by the court sustained.

And that the said court erred in the trial of this action in this, that when defendants in said district court offered in evidence a certain contract signed by W. A. Simpson, Simpson Brothers, S. N. Simpson, per H. M. Simpson, H. M. Simpson, and by Union Pacific Railroad, E. D., R. M. Shoemaker & Co., Shoemaker, Miller & Co., and John D. Perry, by E. M. Bathalow, dated May 10th, 1867, and which appears on pages 34, 35, & 36 of said printed evidence, and plaintiffs in said district court objected, because proof had not been offered to make the instrument competent, the said objection was by the court sustained.

And that the said court erred in the trial of this action in this, that when defendant in said district court offered in evidence the dep-
29 osition of Jno. P. Deveraux, (which appears on pages 36 & 37 of said printed evidence,) and plaintiffs in said district court objected to the copies attached to the deposition being read because they are incompetent, and no proof having been introduced to make secondary evidence competent, the court sustained said objection.

And that the said court erred in the trial of this action, in this, that when defendants in said district court offered in evidence the affidavit for continuance, which, by consent of parties, was to be considered the deposition of the absent witnesses Lamborn, Carlos S. Greely, and L. T. Smith, (which appears on pages 37 and 38 of said printed evidence,) and plaintiffs in said district court objected to the words, "In 1867, three drafts, in equal amounts, were drawn on W. J. Palmer, then treasurer of said railway company, by said E. M. Bathalew, amounting in the aggregate to $6,500; that these drafts were paid as they became due for R. M. Shoemaker & Co., and were charged on the books of said railway company to said firm, R. M. Shoemaker & Co., and were allowed by R. M. Shoemaker on settlement between him and the said railway company," because they are incompetent, irrelevant, and immaterial,
30 the court sustained the said objection.

And that the said court erred in the trial of the said action in this, that when defendants, in said district court, offered in evidence a certified copy of *of* the answer filed in the circuit court of the United States for the district of Kansas, in the case of H. M. Simpson vs. R. M. Shoemaker, (a copy of which appears on pages 39, 40, & 41 of said printed evidence,) and plaintiffs in said district court objected thereto as incompetent, because there is no record to show there is any such case pending, and because pleadings are not evidence against a party, except where the party himself signs them, the said objection was by the court sustained.

And that the said court erred in the trial of this action in this, that when defendant in the district court offered in evidence the deposition of Ferdinand E. Milberger, (which appears on pages 41 and 42 of said printed evidence,) and plaintiff in said district court objected to all of said deposition after the words "In May, 1867," where they occur the second time, as incompetent, irrelevant, and immaterial, the said objection was by the court sustained.

31 And that the said court erred in the trial of this action in this, that when the witness, Henry M. Simpson, gave the following testimony, (which appears on page 42 of said printed evidence,) "Mr. Bartholow drew on St. Louis for the amount, and I cashed the drafts," and plaintiffs in the said district court objected to any statement about drafts as incompetent, the objection was by the court sustained.

And the said court erred in the trial of this action in this, that when plaintiffs asked the witness, Henry M. Simpson, the following question, (which appears on page 44 of said printed evidence,) "How much was there, if you know?" and defendants in said district court objected to the same as incompetent, and, not cross examination, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in the said district court asked the witness, Henry M. Simpson, the following question, (which appears on page 44 of said printed evidence,) "What was your idea of the amount at that time?" and defendants in said district cour' objected thereto as incom-

32 petent, irrelevant, and not cross-examination, the objection was by the court overruled.

And that said court erred on the trial of this action in this, that when defendants in said district court asked the witness, Henry M. Simpson, the following question, (which appears on page 46 of said printed evidence,) "You have spoken of a map brought to you by a wood-chopper; state whether this map by which he was cutting contained these lands in controversy?" and plaintiffs in said district court objected as incompetent, and not a re-examination, the said objection was by the court sustained.

And that the said court erred in the trial of this action in this, that when defendants in said district court asked the witness, Henry M. Simson, the following question, (which appears on page 46 of the printed evidence,) "State what lands were described in that map," and the plaintiffs in the said district court objected as incompetent, and not a re-examination, the said objection was by the court sustained.

And that the said court erred in the trial of said action in this, that when defendants in said district court asked the witness, Henry

33 M. Simpson, the following question, (which appears on page 46 of said printed evidence,) "What were the contents of that map?" and plaintiffs in said district court objected as incompetent, and not a re-examination, the said objection was by the court sustained.

And that the said court erred in the trial of this action in this, that when defendants in said district court asked the witness, Henry M. Simpson, the following question, (which appears on page 46 of said printed evidence,) "Were the lands in controversy marked on that map; if so, how?" and plaintiffs in said district court objected thereto as incompetent and not a re-examination, the court sustained the said objection.

And that the said court erred in the trial of this action in this, that when defendants in said district court asked the witness, Henry M. Simpson, the following question, (which appears on page 46 of the printed evidence,) "What land?" and plaintiffs in said district court objected to the same as incompetent and not a re-examination, the court sustained said objection.

And that the said court erred in the trial of this action in this, that when defendants in said district court asked the witness, Henry

34 M. Simpson, the following question, which appears on page 46 of the printed evidence,) "State what you know, if anything, about

E. M. Batholow acting as agent of the plaintiff," and plaintiffs in said district court objected as incompetent and not a re-examination, said objection was by the court sustained.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, Samuel N. Simpson, the following question, (as appears on page 49 of said printed evidence,) "State whether you took possession and control of the elder & younger Sarcoxie's land that they occupied," and defendants in said district court objected as not cross-examination, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when the plaintiffs in said district court asked the witness, Alexander Caldwell, the following question, (which appears on page 51 of said printed evidence,) "How far is this land from that railroad?" and defendant in said district court objected to the same as immaterial and not a cross-examination, the said objection was by the court overruled.

35 And that the said court erred in the trial of this action in this, that when the plaintiffs in the said district court asked the witness, Alexander Caldwell, the following question, (which appears on the page 52 of said printed evidence,) "Did you ever pay any of that money to Shoemaker, Miller & Co.?" and defendants in said district court objected as incompetent and immaterial, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when the plaintiffs in said district court asked the witness, Alexander Caldwell, the following question, (which appears on page 52 of said printed evidence,) "Had the firm of Shoemaker, Miller & Co. any connection with you or your associates, except in the matter of the purchase of this land?" and defendants in said district court objected thereto as incompetent, irrelevant, immaterial, not a cross-examination, and as calling for the opinion of a witness, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when the plaintiffs in said district court asked the witness, Alexander Caldwell, the following question, (which appears on page 52 of

36 said printed evidence,) "State whether that money was paid to Mr. Shoemaker, on account of Shoemaker, Miller & Co., or to him on his private account—an account of his interest with you as your associate?" and defendant in said district court objected thereto as incompetent, irrelevant, and immaterial, and because it is not a cross-examination, and because it is calling for the opinion of a witness, because it calls for a conclusion of fact and a conclusion of law, the said objection was by the court overruled.

And that the said court erred in the trial of this action, in this, that when the plaintiffs in said district court asked the witness, Alexander Caldwell, the following question, (which appears on page 52 of said printed evidence,) "State whether your answer to the same in reference to the money paid to John F. Perry and Tho's L. Price?" and defendants in said district court objected for the reasons given to the last above question, the said objection was overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, E. M. Bartholow, the following question, (which appears on page 52 of said printed evidence,) "State whether, at the time of signing your name to that, you had any authority from Shoemaker, Miller & Co., in refer-

37 ence to this land in dispute?" and defendants in said district court objected as incompetent and immaterial, and as calling for the expression of an opinion, said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, E. M. Bathalow, the following question, (which appears on page 53 of said printed evidence,) "State if they ever gave you direction to make a settlement in regard to that land," and defendants in said district court objected because they may have been made in writing, and, if so, the writing will show, and because the question is not confined to parol directions, if any, said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, E. M. Bathalow, the following question, (which appears on page 53 of said printed evidence,) "Did you know at the time of the signing this, of any disputed claim between the parties in regard to this land or any part of it?" and defendants in said district court objected to the same as immaterial, the said objection was by the court overruled.

38 And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, E. M. Bartholow, the following question, (which appears on page 53 of said printed evidence,) "Did you have any authority from Shoemaker, Miller & Co., of any kind in writing?" and defendants in said district court objected to the same as immaterial, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when defendants in said district court asked the witness, E. M. Bartholow, the following question, (as the same appears on page 56 of said printed evidence,) "Would you have signed the name of Shoemaker, Miller & Co. at the time, unless, at the time, you regarded yourself as having authority from Shoemaker, Miller & Co., or some member of the firm to do so?" and plaintiffs in said district court objected, because it calls for the opinion of the witness, and for other good and sufficient reasons, the said objection was sustained.

And that the said court erred in the trial of this action in this, that when defendants in said district court objected to the following words in the deposition of R. M. Shoemaker, on page 58 of said printed

39 evidence, "The lands in dispute were among the most valuable of the whole eight thousand acres bought by Shoemaker, Miller & Co., of Caldwell," as being incompetent, the said objection was by the court overruled.

And that the court erred in the trial of this action in this, that when defendants in said district court objected to the words, "And were among the first selected of the purchase," in the deposition of R. M. Shoemaker, on page 58 of said printed evidence, as incompetent and irrelevant, because it should be shown in writing, the objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when the minutes of the Missouri River Railroad Company were offered in evidence by plaintiffs in said district court, and defendants in said district court objected to the same because a copy of the minutes had not been furnished according to demand, and as incompetent, irrelevant, and immaterial, and it was admitted by the parties that no copy of the minutes offered had been furnished the defendants in said district court, the objection of the said defendants was overruled.

40 And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, Alexander Caldwell, the following question, (as appears on page 59 of said printed evidence,) "Is there any entry of any resolution or order of action of the board on the subject of the sale of the lands of the company up to July, 1867?" & defendants in said district court objected thereto as incompetent, irrelevant, and because there had been no copy of any minute or proceeding furnished the said defendants in said district court under the demand for copies and as calling for an expression of opinion by the witness, the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, Alexander Caldwell, the following question, (as appears on page 59 of said printed evidence,) "Is there any order in them with reference to the disposition of these lands within that time?" and defendants in said district court objected thereto as incompetent and irrelevant, because the books will show for themselves, because there has not been a copy fur-
41 nished as demanded, because it calls for the opinion of a witness on the construction of a writing, and because there is no evidence to show or tending to show that all the proceedings of that organization or its board of directors have been put in writing, the objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, Alexander Caldwell, the following question, (which appears on page 60, of said printed evidence, "Is there any such resolution?" and defendants in said district court objected thereto as incompetent and irrelevant, because the books will show for themselves, because there has not been a copy furnished as demanded, because it calls for the opinions of a witness on the construction of a writing, and because there is no evidence to show or tending to show that all the proceedings of that organization or its board of directors have been put in writing, the objection was by the court overruled.

And that said court erred in the trial of this action in this, that when plaintiffs in said district court asked the witness, Alexander Caldwell, the following question, (which appears on page 60 of said printed
42 evidence,) "State whether any consideration was paid for that deed, or for the other instrument, by Mr. Simpson," and defendants in said district court objected thereto as incompetent, immaterial, and because it tends to contradict the papers," the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when the plaintiffs in said district court asked the witness, Alexander Caldwell, the following question, (which appears on page 60 of said printed evidence,) "State when the talk between Smith and Simpson in regard to that deed first commenced, and all the circumstances attending it," and defendants in said district court objected as incompetent and immaterial, and because it is merged in the written instrument," the said objection was by the court overruled.

And that the said court erred in the trial of this action in this, that when the plaintiffs in said district court asked the witness, Alexander Caldwell, the following question, (which appears on page 60 of said printed evidence,) "State the first conversation you ever heard between them on the subject," and defendants in said district
43 court objected as immaterial, incompetent, irrelevant, and because

the conversation was merged in the contract, the said objection was by the court overruled.

And that the said court erred in the trial of this action in and by overruling the objection of defendants in said district court to the following question asked the witness, Alexander Caldwell, to wit: "In what connection was it you asked him what the trouble was, whether it was what the trouble was with the Indians or not?"

And that the said court erred in the trial of said action in and by overruling the objection of defendants in said district court to the following question asked the witness, Alexander Caldwell, to wit: "Where had Simpson been up to that time?"

And that the said court erred in the trial of said action in and by overruling the objection of defendants in said district court to the following question asked the witness, Alexander Caldwell, to wit: "State what took place in Leavenworth."

And that said court erred on the trial of said action in and by
44 overruling the objection of defendants in said district court to the following question asked the witness, Alexander Caldwell, to wit: "Where did you go from your office?"

And that the said court erred on the trial of said action in and by overruling the objection of defendants in said district court, to the following question asked the witness, Alexander Caldwell, to wit: "State whether, in the First National Bank, in presence of Judge Crozier, anything was said between the parties as to who should pay for the stamps; if so, what?"

And that said court erred on the trial of said action in and by overruling the objection of said defendants in said district court to the following question asked the witness, Alexander Caldwell, to wit: "Was anything said by Mr. Smith on that subject?"

And that said court erred in the trial of said action in and by overruling the objection of said defendants in said district court to the following question asked the witness, Alexander Caldwell to wit: "Was that in connection with your remark?"

45 And that said court erred on the trial of said action in and by overruling the objection of said defendants in said district court to the following question asked the witness, Alexander Caldwell to wit: "State whether at that time any registering had been done by the Indians."

And that said court erred on the trial of said action in and by overruling the objection of said defendants in said district court to the following question asked the witness, Alexander Caldwell, to wit: "State whether any Indians registered till after the deed was made."

And that said court erred on the trial of said action in and by overruling the objection of said defendants in said district court by the following question asked the witness, Alexander Caldwell, to wit: "Was there any further trouble about the Indians registering after that agreement was entered into?"

And that said court erred on the trial of said action in and by overruling the objection of said defendants in said district court to the following question asked the witness, Alexander Caldwell, to wit:

46 "Have you stated all the inducements to the making of the contract in question?"

And that said court erred on the trial of this action in and by overruling the objection of said defendants in said district court to the following question asked the witness, Alexander Caldwell, to wit: "State whether there was any other inducement of any kind to the making of that deed and contract except what you have stated."

And that said court erred in the trial of said action in and by overruling the objection of said defendants in said district court to the following question asked the witness, Robert Crozier, to wit: "State what conversation you heard between these parties as to this deed and contract, what they were made for."

And that said court erred in trial of said action in and by overruling the objection of said defendants in said district court to the following question asked the witness, Robert Crozier, to wit: "What was said by Mr. Smith in that conversation?"

And that the said court erred on the trial of said action in and by overruling the objection of defendants in said district court to the following question asked the witness, Robert Crozier, to wit:
47 "Was there anything said at the time the papers were left with you about the registration of the Indians; if so, what?"

And that said court erred on the trial of said action in and by overruling the objection of defendants in said district court to the following questions asked the witness, John G. Pratt, to wit: "Were you agent of the Delaware Indians in February, 1867?"

And that the said court erred on the trial of said action in and by overruling the motion of defendents in said district court to strike out the following answer of the witness, John G. Pratt, to wit: "I recollect when I was directed to make it."

And that the said court erred on the trial of said action in and by overruling the objection of defendants in said district court to the following question asked the witness, John G. Pratt, to wit: "Were they called together under your direction?"

And that the said court erred on the trial of said action in and by overruling the objection of defendants in said district court to the
48 following question asked the witness, John G. Pratt, to wit: "State what white men were there the day the registry was to take place."

And that the said court erred on the trial of said action in and by overruling the objection of defendants in the district court to the following question asked the witness, John G. Pratt, to wit: "State whether the registration was commenced on the morning of the day they were called together for that purpose."

And that the said court erred on the trial of said action in and by overruling defendants' (in said district court) objection to the following question asked the witness, John G. Pratt, to wit: "State whether Mr. Simpson was at your house before the registration commenced."

And that the said court erred on the trial of said action in and by overruling said defendants' (in said district court) objection to the following question asked the witness, John G. Pratt, to wit: "State whether there was trouble in the Indians commencing to register that day."

And that the said court erred on the trial of said action in and by overruling said defendants' (in said district court) objection to the following question asked the witness, John G. Pratt, to wit:
49 "How long did that obstruction, whatever it was, last?"

And that the said court erred on the trial of said action in and by overruling said defendants' (in said district court) objection to the following question asked the witness, John G. Pratt: to wit: "Do you know of Mr. Smith, Mr. Caldwell, and Mr. Simpson coming to Leavenworth?"

And that the said court erred on the trial of said action in and by overruling the said defendants' (in said district court) objection to the following question asked the witness, John G. Pratt, to wit: "State

whether that obstruction ceased after they came to Leavenworth, or whether it ceased after they returned from Leavenworth."

And that the said court erred on the trial of said action in and by the following question asked the witness, John G. Pratt, to wit: "Did you know what the nature of his business was when on the reservation before?"

And that the said court erred on the trial of said action in and by overruling said defendants' (in said district court) objection to the following question asked the witness, John G. Pratt, to wit: "Do
50 you know whether he was in the habit of dealing with the Indians, or having intercourse with them of any kind?"

And that the said court erred on the trial of said action in and by overruling the objection of defendants in said district court to the following question asked the witness, John G. Pratt, to wit: "State what, if any, knowledge you have as to whether he was intimate with the chiefs of the tribe or not."

And that the said court erred on the trial of said action in and by overruling the objection of the defendants in said district court to the following question asked the witness, John G. Pratt, to wit: "State whether, if you know, he was with Johnny-Cake, or any of the other chiefs the night before the registration was to take place."

And that the said court erred on the trial of said action in and by overruling the objections of defendants in said district court to the following question asked the witness, John G. Pratt, to wit: "State whether he was in the reservation among the Indians near that time, if you know."

And that the said court erred on the trial of said action in
51 and by overruling the objection of defendants in the district court to the following question asked the witness, John G. Pratt, to wit: "Do you know whether he was acquainted with these Delaware chiefs and was familiar with them at that time or not?"

And that the said court erred on the trial of said action in and by overruling the objection of defendants in said district court to the following question asked the witness, John G. Pratt, to wit: "You received these papers from the First National Bank, did you?"

And that the said court erred on the trial of said action in and by overruling the objection of defendants in said district court to the following question asked the witness, John G. Pratt, to wit: "State whether you knew that S. N. Simpson was going to be there at that time."

And that the said court erred in the trial of said action in and by overruling the objection of defendants in said district court to the following question asked the witness, John G. Pratt, to wit: "State whether he had any business with the agency at that time."

And that the said court erred on the trial of said action in and
52 by overruling the objection of defendants to the following question asked the witness, John G. Pratt, to wit: "You have been asked certain questions in reference to the obstructions; did you say or do anything to effect that registration?"

And that the said court erred on the trial of said action in and by overruling the objection of defendants to the following question asked the witness, John G. Pratt, to wit: "State whether you made all the efforts you could to have it proceed before the time those men came to Leavenworth."

And that the said court erred on the trial of said action in and by overruling the objection of defendants to the certified copy of the al-

leged certificate of organization of the Missouri River Railroad Company, offered in evidence by plaintiff."

And that the said court erred on the trial of said action in and by overruling defendants' objection to the record of the proceedings of the Missouri River Railroad Company up to, and including, the meeting of May 25th, 1865, being received in evidence.

And that the said court erred on the trial of said action in and by refusing and neglecting to rule on defendants' objection to the
53 record of the proceedings of the Missouri River Railroad Company up to, and including, the meeting of May 25th, 1865, being read in evidence.

And that the said court erred on the trial of said action in and by sustaining the objection of the said plaintiffs to the following question asked the witnesses, S. N. Simpson, to wit: "State whether you then said anything to Mr. Caldwell on the subject; if so, state what, & what he said to you."

And that the said court erred on the trial of said action in and by overruling the objection of defendants to the following question asked the witness, John G. Pratt, to wit: "Who was acting as agent of the Delawares, at that time, between the Government and the Indians?"

And that the said court erred in the trial of said action in and by overruling the objection of defendant' to the following question asked the witness, John G. Pratt, to wit: "How long after that time was it you called for those papers, on Judge Crozier?"

And that the said court erred on the trial of said action in and by overruling the objection of defendants in said district court to
54 the following question asked the witness, John G. Pratt, to wit: "At the time Mr. Simpson was there, at the time the registration was about to take place, did you have a talk with him on the subject of the registration or about his getting the land?"

And that the said court erred on the trial of said action in and by sustaining plaintiffs' (in said district court) objection to the following question asked the witness, John G. Pratt, to wit: "Did you give anything for the land?"

And that the said court erred on the trial of said action in and by sustaining plaintiffs' (in said district court) objection to the following question asked the witness, John G. Pratt, to wit: "Have you given any consideration for any part of that section?"

And that the said court erred on the trial of said action in and by sustaining plaintiffs' (in said district court) objection to the following question asked the witness, John G. Pratt, to wit: "What, if anything, have you ever given for that part of a section you referred to?"

And that the said court erred on the trial of said action in and by sustaining plaintiffs' (in said district court) objection to the fol-
55 lowing question asked the witness, John G. Pratt, to wit: "Have you had a conversation with S. N. Simpson on that subject?"

The said William A. Simpson, the plaintiff herein, therefore p'ays judgment, that the several judgments above mentioned, and each of them, be reversed, and that he, the plaintiff herein, and the defendants in the said action, and each of them, be restored to all things which they, or any, or either of them have lost by reason thereof or of any of said judgments, and that the several conclusions of law, made in said action by said court, be reversed, vacated, and set aside, and that this, the above-named supreme court of the State of Kansas, proceed and render such judgment in favor of the plaintiff herein, and in favor of the defendants in said action, as said district court should have ren-

dered, or remand the cause to the said district court for such judgment.

And that this court grant and cause the plaintiff herein, and the defendants in said action, to have a new trial of and in said action, unless judgment is rendered in favor of the plaintiff herein in bar of said action, and restoring him to what he has lost because of the several judgments so rendered, as shown by said case made, and in favor of the defendants in said action in bar thereof; and that said William
56 A. Simpson may have such other and further relief, herein and in said action, as he is or may be entitled to, &c.

CLOUGH & WHEAT,
Attorneys for Plaintiff in Error,
WILLIAM A. SIMPSON.

And thereupon the following precipe for summons in error was filed on the same day, which is in the following words and figures, to wit:

The clerk of the above-named supreme court will please issue a summons in error to the several defendants in error, and direct the same to the sheriff of Leavenworth County, to serve, &c.

CLOUGH & WHEAT,
Att'ys for Plaintiff in Error.

And thereupon, on the same day, the following security for costs was filed:

I, the undersigned, hereby undertake and promise, bind, and obligate myself to pay all costs in the above-entitled action for which William A. Simpson, the plaintiff therein, may be liable.

HENRY M. SIMPSON.
WILLIAM A. SIMPSON.
F. W. GILES.

Approved and filed Nov. 16th, 1870.

A. HAMMATT, *Clerk.*

57 And thereupon, be it remembered that, on the 12th day of January, 1871, the petition in error of David Ackers and others was filed, which was in the words and figures following, to wit:

In the supreme court of the State of Kansas.

WILLIAM A. SIMPSON, PLAINTIFF IN ERROR,
vs.
C. S. GREELY, S. M. EDGELL, WILLIAM McPherson, Robert E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker, and J. W. Kenney, partners as Shoemaker, Miller & Co.; David Ackers, William R. Smith, Geo. Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, defendants in error.

And now came the above-named defendants, David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, by Griswold & Britton, their attorneys, and pray said court that, for the causes and reasons stated in the petition in error of said William A. Simpson, in

58 this case, the judgment rendered against them, in petition mentioned may be reversed.

GRISWOLD & BRITTON,
Att'ys for said Defendants.

59 EXHIBIT A.

STATE OF KANSAS,
Leavenworth County, ss:

In the district court of the first judicial district of the State of Kansas, sitting in said county of Leavenworth.

C. S. GREELY, S. M. EDGELL, WILLIAM M. McPherson, Robert E. Carr, Edward Miller, Mathew Baird, R. M. Shoemaker, and J. W. Kenny, partners as Shoemaker, Millar & Co., plaintiffs,
vs.
WILLIAM A. SIMPSON, DAVID ACKERS, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, and J. H. Cochran, defendants.
} Case made.

Be it remembered that heretofore, and on the ninth day of December, A. D. 1868, the above-named plaintiffs commenced an action in the above-named court against the above-named defendants, and then filed therein their petition and caused a summons to be issued in said action to said defendants, and that said defendants afterwards answered
60 said petition, and afterwards filed an amended answer to said petition, and that afterwards at the May term, A. D. 1870, of said court in said county of Leavenworth, said action came on for trial, and the parties, plaintiffs and defendants, waived a jury and submitted said action to the court for trial, and when said plaintiffs commenced to offer evidence, said defendants objected to any evidence being received, because said petition did not state facts sufficient to constitute a cause of action, which objection was then sustained by the court. And then said court gave said plaintiffs leave to amend said petition by interlineation on the margin thereof, to which leave of the court, so far as the same gave leave to amend by interlineation, said defendants then excepted, because thereby a record and a paper belonging to the files of said court would be mutilated. And then said plaintiffs in the body of said petition amended the same by then interlining and writing the words "and legal," where they appear in the copy of said petition as amended, as the same is hereinafter set forth, and by then interlining and writing in said petition the words, "and are entitled to the possession thereof," where they appear in said copy of said petition. And said defendants then moved the court to strike said petition from the files
61 of said court, because the same had been so amended, which motion was then by the court overruled, to which ruling and decision of the court said defendants then excepted, of which said petition as so amended and of the endorsement thereon, the following is a copy, to wit:

62 *Petition.*

THE STATE OF KANSAS,
Leavenworth County, ss:

In the district court sitting in and for the county of Leavenworth.

C. S. GREELY, S. M. EDGELL, WILLIAM M. McPherson, Robert E. Carr, Edward Millar, Mathew Baird, R. M. Shoemaker, J. W. Kenny, partners as Shoemaker, Millar & Co., plaintiffs,

vs.

WILLIAM A. SIMPSON, DAVID ACKERS, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, J. H. Cochran, defendants.

The said plaintiffs, partners as Shoemaker, Millar & Co., complain of the said defendants for that the said plaintiffs have a real *[and legal]* estate in, and are seized in fee-simple of the following lands and tenements, to wit: The fractional part of section (34) thirty-four, town twelve, (12,) range twenty, (20,) lying north of the Kansas River; the south fractional half of section twenty-seven, (27,) town twelve, (12,) range twenty, (20;) and the northeast fractional quarter and east
63 one-half of northwest quarter of section twenty-seven, (27,) town twelve, (12,) range twenty, (20;) the east half of southeast quarter of section twenty-two, (22,) town twelve, (12,) range twenty, (20;) the west fractional half of the northwest quarter of section twenty-six, (26,) town twelve, (12,) range twenty, (20;) and the south half of the northeast quarter of the northwest quarter, and the south fractional part of the east half of the northwest quarter of section twenty-six, (26,) town twelve, (12,) range twenty, (20,) containing in all six hundred & forty-four and $\frac{22}{100}$ acres, lying and being in the county of Leavenworth, State of Kansas, *[and are entitled to the possession thereof,]* and that the said defendants unlawfully keep them, the said plaintiffs, out of the possession thereof.

And the plaintiffs further aver that the said defendants have been in the possession of the said premises, receiving the rents, issues, and profits thereof, from the 21st day of February, A. D. 1867, up to the time of commencing this action, and during said period have cut down, carried away, and converted to their own use, standing and growing timber thereon, to the amount and value of ten thousand dollars,
64 65 and the plaintiffs aver that they have sustained damages by the said unlawful withholding of the possession of the said premises during all that time and the taking and conversion of the timber aforesaid, to the sum of ten thousand dollars.

Wherefore said plaintiffs pray judgment against the said defendants for the recovery of the possession of the said premises, and also for the said sum of ten thousand dollars, their damages as aforesaid sustained.

ROB'T CROZIER AND
THO'S P. FENLON,
Att'ys for Pl'ffs.

Which petition was endorsed as follows:

No. 2998. Shoemaker, Millar & Co., vs. William A. Simpson et al. Petition & precipe. Filed 9th Dec., 1868. Henry Casey, clerk. Crozier & Fenlon.

66 And be it further remembered, that afterwards, on the eighth day of June, A. D. 1870, in pursuance of leave of said court, first given for such purpose, with consent of said plaintiffs, the defendants in said action therein filed their answer to said petition as so amended as aforesaid, of which said answer, and of the endorsements thereon, the following is a copy, to wit:

67 *Answer.*

STATE OF KANSAS,
Leavenworth County, ss:

In the district court of the first judicial district of the State of Kansas, sitting in said county of Leavenworth.

C. S. GREELY, S. M. EDGELL, WILLIAM M. McPherson, Robert E. Carr, Edward Millar, Mathew Baird, R. M. Shoemaker, J. W. Kenney, partners as Shoemaker, Millar & Co., plaintiffs,

vs.

WILLIAM A. SIMPSON, DAVID ACKERS, WILLIAM R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, J. H. Cochran, defendants.

And now come the several defendants in this the above-entitled action, and for answer to the petition in said action, including all the amendments to and of the same, said defendants deny all, each, and every allegation and averment therein contained, save and except that said defendants admit that they are and have been, ever since the 21st
68 day of February, A. D. 1867, in possession of the several tracts of land described in said petition.

And for a second and further ground of defence in this behalf, and for a counter-claim and cause of action, and for relief against the several plaintiffs above named, the several defendants herein aver that the several tracts of land described in the petition of the above-named plaintiffs in this action, which said tracts of land are situated, lying, and being in the county of Leavenworth, and State of Kansas, and are fully described in the second instrument of writing next hereinafter copied, were and are part and parcel of the lands mentioned in the treaty between the Government of the United States of America and the Delaware tribe of Indians, concluded July 4th, 1866, ratification of which was advised on the 26th of July, A. D. 1866, and was then ratified, and was duly proclaimed on the 10th of August, A. D. 1866.

And said defendants further aver that the several tracts of land above mentioned are part and parcel of the lands mentioned in the second article of said treaty as "the remaining part of said reservation," the same several tracts of land being part and so much of the lands
69 mentioned in said treaty, which the Secretary of the Interior was by said treaty authorized and empowered to sell, and that the same several tracts of land first above mentioned were not any part of the mill reservation mentioned in said treaty, nor were any of the blacksmith shops therein mentioned on said several tracts of land or any of them.

And said defendants further aver that the Secretary of the Interior

did, within thirty days after and from the ratification of said treaty, to wit, on the 11th day of August, 1866, give to the Missouri River Railroad Company notice that he was authorized to contract with them, or other responsible party or parties, for the sale of the lands mentioned in the seventh article of said treaty, on the terms specified in said treaty, indicating the approximate quantity thereof.

And said defendants further aver that said company duly received said notice at their usual place of doing business in the State of Kansas, afterwards, to wit, on the 30th day of August, 1866, and that within twenty days after so receiving such notice said company did elect to make the purchase of said lands and to purchase the same under said treaty, by filing with said Secretary their bond with approved
70 security in double the amount proposed to be paid by them for the whole of said lands, guaranteeing that they would purchase all of the lands to be sold under the provisions of said treaty, and that they would pay for them in accordance with the terms thereof.

And said defendants further aver that afterwards, on the 31st day of August, 1866, the United States of America, by James Harlan, the Secretary of the Interior, and the Missouri River Railroad Company, by Leonard T. Smith, its president, and agent in that behalf, thereto duly authorized, made and executed a certain written instrument of which the following is a copy, to wit:

This agreement, made and entered into on this thirty-first day of August, 1866, between James Harlan, Secretary of the Interior, for and in behalf of the United States of America, of the first part, and the Missouri River Railroad Company, a corporation existing in the State of Kansas, by the laws thereof, of the second part, witnesseth:

Whereas, by the second article of the treaty concluded at the
71 Delaware agency, Kansas, on the fourth day of July last past, between said United States and the Delaware tribe of Indians, it is provided, "That the Secretary of the Interior shall be and he is authorized to sell to said Missouri River Railroad Company, or to other responsible party or parties, in a body, all the remaining part of said reservation, being the lands conveyed to said Delaware Indians in pursuance of the provisions of the supplemental treaty of September 24th, 1829, and all other lands owned by the said tribe in the State of Kansas, not previously disposed of, except as hereinafter provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements;

And whereas said Secretary, within thirty days after the ratification of said treaty, gave the notice required by the seventh article thereof to said company; and

Whereas, within twenty days after receiving said notice, said company elected to make the purchase of said lands at two dollars and fifty cents per acre without improvements, by filing with the said Secretary their bond, with approved security in double the amount proposed to be paid by them for the whole of said lands, and guaranteeing that
72 they would purchase all of the lands to be sold under the provisions of said treaty, and that they would pay for them in accordance with the terms thereof; and

Whereas said company did, by resolution, authorize and direct Leonard T. Smith, president of said company, to file said bond, and to do such other acts as may be necessary to secure said lands, as by copy of said resolution, certified by the Secretary and the seal of said company, and on file in the Department of the Interior, fully and at large appears; and there being no other offer for said lands:

Now, therefore, said party of the first part, in consideration of the premises and of the sums of money hereinafter mentioned to be paid by said party of the second part, does hereby agree to sell to said party of the second part all said lands provided to be sold by said treaty, at and for the sum of two dollars and fifty cents per acre, exclusive of improvements, and subject to all the terms, exceptions, conditions, and limitations in said treaty mentioned; and said party of the second part, in consideration of the premises, doth hereby agree to pay,
73 within sixty days from the date of these presents, to the Secretary of the Interior, in trust for the Delawares, in lawful money of the United States, the price and value of all the unallotted lands whereof mention is made in said treaty, at the rate of two dollars and fifty cents per acre; and, also, the appraised value of the improvements thereon, to be ascertained in the mode provided for in said treaty, excepting therefrom the mill reservation and the quarter sections upon which the council-house and blacksmith shops are built, the use of which shall be retained until the final removal of the Delawares, and for which payment shall not be required from the said party of the second part until possession is delivered, and from time to time thereafter, as often as the Secretary of the Interior shall notify the said party of the second part that ten thousand acres or more of said lands have been vacated by said Indians, within three months thereafter said party of the second part agrees to pay to the Secretary of the Interior, in trust for the said Indians, the price of said lands so vacated, at the rate of two dollars and fifty cents per acre thereof; and, also, the appraised
74 value of the improvements, and so on until all are paid for according to the true intent and meaning of said treaty; and, as land shall be paid for, patents therefor, conveying the same in fee-simple, shall be from time to time issued to said party of the second part or its assigns by the President of the United States.

In witness whereof said James Harlan, Secretary as aforesaid, hereunto sets his hand and the seal of said Department, and the said Leonard T. Smith, president of the said Missouri River Railroad Company, and on behalf of said company, and in pursuance of the power upon him thereunto conferred, sets his hand and seal on the day and year first aforesaid.

[SEAL.] (Signed) JAMES HARLAN,
Secretary of the Interior.

[SEAL.] (Signed) LEONARD T. SMITH,
President of Missouri River Railroad Company.

And said defendants further aver that under and in pursuance of said treaty and said written instrument the Missouri River
75 Railroad Company aforesaid, duly paid for the lands aforesaid; and said defendants further aver that afterwards, to wit, on the 21st day of February, A. D. 1867, the Missouri River Railroad Company aforesaid, by L. T. Smith, its president, and agent in that behalf, by it thereto duly authorized and empowered, made, executed, sealed with its seal, and delivered to one Samuel N. Simpson, its certain written instrument of that date, commonly called a deed, of which said deed, and of a certificate thereon made and written, the following is a copy, to wit:

Know all men by these presents that the Missouri River Railroad Company, in consideration of one dollar and other valuable considerations to it paid by Samuel N. Simpson, of Lawrance, Kansas, the receipt

whereof is hereby acknowledged, do hereby convey, remise, release, and forever quitclaim to the said Samuel N. Simpson, his heirs and assigns forever, all the right, title, and interest acquired by the Missouri River Railroad Company, under treaty of July 4th, 1866, or by Le'n. T. Smith, as its president, or that they may hereafter acquire under or by virtue of said treaty, of the following-described lands, to wit:

76 The fractional part of section 34, town 12, range 20, lying north of Kansas River; the south fractional half of section 27, town 12, range 20, and the northeast fractional one-quarter, and east one-half of N. W. $\frac{1}{4}$ of section 27, town 12, range 20; the east half of southeast quarter of section 22, town 12, range 20; the west fractional half of the northwest quarter of section 26, town 12, range 20, and the south half of the northeast quarter of the northwest quarter, and the south fractional part of the east half of the northwest quarter of section 26, town 12, range 20, containing in all six hundred and forty-four and twenty-two hundredths acres, ($644\frac{22}{100}$,) being of the lands of the Delaware diminished reserve, in Leavenworth County; (it being understood that if there are any improvements on the above-described lands, to be paid for under the treaty before mentioned, the said Simpson shall pay for the same, and reference is also hereby made to an agreement of the parties of this date, which qualifiedly controls this deed; and all estate, title, and interest of the said Missouri River Railroad Company, either in law or in equity of, in, and to said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof; to have and to hold the same to the

77 only proper use of the said Samuel N. Simpson, his heirs and assigns, forever.

In witness thereof the said Missouri River Railroad Company, by its president, Le'n. T. Smith, has hereto set its hand and seal this twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-seven.

MISSOURI RIVER RAILROAD COMPANY,
[OFFICIAL SEAL.] By L. T. SMITH, *President.*

The interlineations made between the 10 & 11 line' before signing.

[$6 revenue stamp, affixed.]

STATE OF KANSAS,
Leavenworth County, ss:

Be it remembered that on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-seven, before me, a notary public in and for the county of Leavenworth, personally came Le'n. T. Smith, president, the party named in the foregoing deed, and acknowledged the signing and sealing thereof to be his voluntary act and deed for the use and purposes therein named.

In testimony whereof I have hereunto subscribed my name and

78 affixed my notarial seal on the day and year aforesaid.

[NOTARIAL SEAL.] L. W. ROYS,
Notary Public.

Recorded May 24th, 1867, at 10 o'clock a. m.

H. C. KELLER,
Register of Deeds.

And said defendants further aver that said deed was on the 24th day of May, A. D. 1867, at 10 o'clock a. m. of that day, duly left, deposited, and filed for record with and in the office of the register of deeds, in and for said county of Leavenworth, in the State of Kansas, and that the same was then and there duly recorded in said office.

And said defendants further aver that at the same time, on the said 21st day of February, 1867, the Missouri River Railroad Company, aforesaid, by L. T. Smith, its president, and agent in that behalf, by it thereto duly authorized and empowered, one Alexander Caldwell, by the name and description of A. Caldwell, vice-president, and the said Samuel N. Simpson, by the name of S. N. Simpson, made and executed their certain written instrument of that date, sealed with the seal of said company, of which said written instrument, the following is a copy, to wit:

79 The Missouri River Railroad Company has for a valuable consideration, this day, made a deed of the following-described lands:

The fractional part of section 34, town. 12, range 20, lying north of Kansas River; and the south fractional $\frac{1}{2}$ of section 27, town. 12, range 20; and the N. E. fractional $\frac{1}{4}$ and E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ section 27, town. 12, range 20; and the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ section 22, town. 12, range 20; and the west fractional $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 26, town. 12, range 20, and the west fractional $\frac{1}{2}$ and the south $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$; and the south fractional part of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 26, town. 12, range 20, containing 644 $\frac{22}{100}$ acres, all in the county of Leavenworth, to the said S. N. Simpson.

And it is agreed by said railroad company and the said Simpson, that if said company shall not obtain a patent for any tract, or all of said land described in said deed, they agreeing to use the same diligence to obtain title to the lands conveyed by said company that is made by said company to obtain title to other lands purchased by said company under the contract of purchase of said Delaware diminished re-

80 serve, Kansas, aforesaid, pursuant to the terms of the treaty of July 4th, 1866, the said company will allow the said Simpson to select other of said lands, equal in amount to the number of acres mentioned in said deed for which the company shall not acquire title, and the said company will convey the same by good and valid deed to him in the event of the failure of title, the deed this day made of lands to which said company has or shall obtain no title, shall be void; and the said company agree to give the said Simpson a choice of any lands to which they shall acquire title *to*, not then sold under such contract of purchase, and to convey such lands in lieu of, and to an equal amount to, the lands described in a deed of this date, to which the title of the company shall fail.

And the said Leonard T. Smith, president, and Alexander Caldwell, vice-president, of said company, for and in consideration of the premises aforesaid, for themselves jointly and severally covenant and agree with the said Simpson that this agreement shall be well and truly kept by the said railroad company.

81 In witness whereof we have hereunto set our hands and seals, on this 21st of February, A. D. 1867; the interlineations between the tenth and eleventh lines were made before signing; and improvements

on the lands selected under this agreement to be paid for under the treaty before mentioned, the said Simpson shall pay for.

{SEAL OF MO. RIVER RAILROAD CO.}

MISSOURI RIVER RAILROAD COMPANY,
By L. T. SMITH. *President.*
A. CALDWELL, *Vice-President.*
S. N. SIMPSON.

[Ten cent rev. stamp affixed.]

And said defendants further aver that afterwards, to wit, on the 10th day of May, 1867, the Union Pacific Railroad Co., E. D., R. M. Shoemaker, John D. Perry, and the plaintiffs in this action as partners, by and under the name, style, and firm of Shoemaker, Millar & Co., by E. M. Bartholow, their agent, by them thereto duly authorized and empowered, made and executed their certain other written instrument of that date, of which the following is a copy, to wit:

Whereas E. M. Bartholow, for R. M. Shoemaker & Co., has this day delivered to Simpson & Bros. his certain drafts on W. J. Palmer,
82 as treasurer of the Union Pacific Railway Company, E. D., being three in number, and amounting in the aggregate to $ six thousand five hundred dollars.

Now, therefore, the said Simpson Bros. and S. N. Simpson, H. M. Simpson, and W. A. Simpson, acknowledge and promise that said drafts, when paid, shall be a full satisfaction of all accounts, claims, and demands now held by them, or belonging to them, against said R. M. Shoemaker & Co., Shoemaker, Millar & Co., John D. Perry, or the Union Pacific Railway Company, E. D., except as hereinafter specified.

And in consideration of the above release, the said Union Pacific Railway Company, E. D., John D. Perry, R. M. Shoemaker & Co., and Shoemaker, Millar & Co., acknowledge full payment and full satisfaction for and on account of all claims, demands, and accounts against said Simpsons, or either of them, belonging to said Union Pacific Railway Company, E. D., John D. Perry, R. M. Shoemaker & Co., Shoemaker, Millar & Co., except as hereinafter specified. But it is understood that this settlement does not apply to any claims connected with the Stevens' mortgage, (so-called,) or with any property in North Lawrence, held and occupied and owned jointly by any of the parties
83 hereto, or held or occupied for railroad purposes; nor does it apply to the debts of the Delaware Lumber Company, an approximate estimate of which is hereto annexed, and which, so far as the same are just, are to be paid in the following proportion:

R. M. Shoemaker.....One-eighth.
R. M. Shoemaker & Co.....Four-eighths.
J. D. Perry.....One-eighth.
H. M. Simpson.....One-eighth.
Estate of Gen. Lane.....One-eighth.

Nor does it apply to any shares of stock in the capital of said railway company which said S. N. Simpson may claim to own.

It is further agreed that if any amount is legally due Duncan & Co., that Union Pacific Railway Company, E. D., will assume and pay the same, and that if any amount is legally due Jackson & Mathews, that Simpson Bros. will assume and pay the same; and that a certain suit now pending in the district court, Douglas county, Kansas, in which Henry M. Simpson is plaintiff, and R. M. Shoemaker and others are

defendants, is included in the settlement herein before made,
84 and the said Simpsons will dismiss the same at their own costs.
Lawrence, Kansas, May 10, 1867.

W. A. SIMPSON,
SIMPSON BROTHERS,
S. N. SIMPSON,
per H. M. SIMPSON.
H. M. SIMPSON,
UNION PACIFIC RAILWAY CO. E. D.,
R. M. SHOEMAKER & CO.,
SHOEMAKER, MILLAR & CO.,
JOHN D. PERRY,
By E. M. BARTHOLOW.

[Five-c. revenue stamp.]

And said defendants further aver that said defendant William A. Simpson, and Simpson Brothers, and S. N. Simpson, and H. M. Simpson, also then and there executed the same written instrument.

And said defendants further aver that afterwards, on the 28th day of May, 1867, said Samuel N. Simpson made and executed his certain written instrument of that date, commonly called a deed, of which the following is a copy, to wit:

This indenture, made this twenty-eighth day of May, in the year
85 of our Lord one thousand eight hundred and sixty-seven, between S. Newell Simpson and his wife, Kate L. Simpson, of city of Lawrence, in the county of Douglas and State of Kansas, of the first part, and William A. Simpson, of city of Lawrence, in the county of Douglas and State of Kansas, of the second part, witnesseth:

That the said parties of the first part, in consideration of the sum of one dollar, and of other valuable considerations, to them duly paid, have sold, and by these presents do grant and convey to the said party of the second part, his heirs, and assigns all those tracts and parcels of land situated in Leavenworth County, and State of Kansas, and described as follows, to wit:

86 The fractional part of section thirty-four, town. twelve, range twenty, lying north of Kans. river, and the south fractional half of section twenty-seven, town. twelve, range twenty, and the northeast fractional quarter of east half of the northwest quarter of section twenty-seven, township twelve, range twenty, and the east half of the southeast quarter of section twenty-two, township twelve, range twenty, and the west fractional half of the N. W. $\frac{1}{4}$ of section twenty-six, town. twelve, range twenty, and the south half of the northeast quarter of the northwest quarter, and the south fractional part of the east half of the northwest quarter of section twenty-six, town. twelve, range twenty, containing six hundred forty-four and $\frac{22}{100}$ acres in the aggregate, and being the same real estate conveyed to me by the Missouri River Railroad Co., by deed bearing date February 21st, A. D. 1867, with the appurtenances, and all the estate, title, and interest of the said party of the first part therein; and the said S. Newell Simpson does hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inherit-
87 ance therein, free and clear of all incumbrance, and that he will warrant and defend the same, in the quiet and peaceable possession of said party of the second part, his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals, the day and year above written.

SAMUEL N. SIMPSON.

Sealed and delivered in presence of—
T. N. TERRILL.

[$6 in revenue stamps affixed.]

And said defendants further aver that said Samuel N. Simpson, then and there delivered said deed to said William A. Simpson, and that said deed was afterwards, to wit, on the 31st day of May, 1867, duly left deposited and filed for record with, and in the office of, the register of deeds in and for the county of Leavenworth, in the State of Kansas, and that the same was then and there duly recorded in said office.

And said defendants further aver that said Samuel N. Simpson, immediately after the execution of the said deed by said Missouri River Railroad Company, first aforesaid, to wit, on the 21st day of
88 February, 1867, went into possession of said premises under said conveyance, and made valuable and lasting improvements thereon, and continued in possession until the sale thereof by him to said William A. Simpson, immediately after the execution of the deed to him as above alleged, went into the possession of said premises under said conveyance, and has ever since, himself or by his tenants under him, been in the possession thereof and has made valuable and permanent improvements thereon.

And these defendants aver that said defendant William A. Simpson, made said purchase, took said deed and went into possession as aforesaid, of said land without notice, actual or constructive, of any transfer of any interest in the said land by said railroad company, other than said transfer to said Samuel N. Simpson or of any ownership or rights in said land, or of any interest therein, except said Samuel N. Simpson's interest therein.

And these defendants further aver that the several Delaware Indians, who at the date of said treaty occupied said land, did not elect to become citizens, but elected to remain members of the said Dela-
89 ware tribe of Indians, and removed from and gave up possession of said lands.

And these defendants further aver that the improvements on the lands first aforesaid, at the time when said treaty was made, were, pursuant thereto, appraised at sums amounting in the aggregate to the sum of fourteen hundred dollars; and that before the commencement of this action the said William A. Simpson offered to pay, and tendered the amount and sums at which said improvements thus appraised to the Missouri River Railroad Company aforesaid, and to said Caldwell, and now brings the same into court, and tenders the same to whomsoever the court shall finally decide is entitled thereto.

And said defendants further aver that afterwards, to wit, on the 28th day of October, A. D. 1867, the plaintiffs and said Alexander Caldwell, and divers others persons, to these defendants unknown, fraudulently combined and confederated together to cheat and defraud said William A. Simpson out of the several tracts of land first above mentioned, and to do so, and in and about that matter, they the said plaintiffs and said Caldwell, and divers others unknown to said defendants, without
90 any right, power, or authority so to do, induced, obtained, and procured the United States of America, its officers and agents, to

make, issue, and deliver to and in favor of said Caldwell, certain letters-patent commonly called a patent, whereby the United States of America conveyed to said Caldwell, his heirs and assigns, in fee simple forever, the said several tracts of land with other *other* lands, including all other lands mentioned or referred to in the written instrument first above mentioned, as pretended assignee of the Missouri River Railroad Company aforesaid, whereas he was not such assignee under any valid assignment good against either said Samuel N. Simpson or said William A. Simpson, which said patent, from the commencement thereof to the description of the lands thereby conveyed, is in the words and figures following, to wit:

United States of America, to all whom these presents shall come, greeting:

Whereas by the second article of the treaty concluded on the 4th day of July, 1866, between the United States and the Delaware tribe
91 of Indians, as ratified on the 10th day of August, 1866, the Secretary of the Interior is "authorized to sell" to the "Missouri River Railroad Company, or to other responsible party or parties in a body," "all that part of the Delaware Indian reservation in the State of Kansas not heretofore sold to the Leavenworth, Pawnee and Western Railroad Company," being the lands conveyed to said Delaware Indians in pursuance of the provisions of the supplemental treaty of September twenty-fourth, eighteen hundred and twenty-nine, and all other lands owned by the said tribe, in the State of Kansas, not previously disposed of except as "thereinafter" provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements.

And whereas it appears from a return dated October 17th, 1867, from the Secretary of the Interior to the Commissioner of the General Land-Office, that the Missouri Railroad Company "has, through its assignee, Alexander Caldwell, complied with the terms and conditions of the contract made by said company with the late Secretary of the Interior, Hon. James Harlan, for the purchase of the Delaware diminished re-
92 serve in Kansas, under the provisions of the "aforesaid" treaty concluded with the Delaware Indians, July 4, 1866, said return being accompanied by a "list of lands within the Delaware diminished reservation to be conveyed by patent to the Missouri River Railroad Company or its assignees."

And whereas the said list has been approved by the Secretary of the Interior, with directions to the Commissioner of the General Land-Office to cause a patent to be issued in favor of Alexander Caldwell, assignee of the Missouri River Railroad Company for the lands described therein, containing in the aggregate ninety-two thousand five hundred and ninety-eight acres and thirty-three hundredths of an acre situated south of the base-line and east of the sixth principal meridian, in the State of Kansas, and being described as follows, to wit:

And said defendants further aver that said Caldwell and said plaintiffs so procured said patent to be made, executed, and issued to
93 said Caldwell among other reasons for the purpose of fraudulently preventing the Missouri River Railroad Company from acquiring the legal title to the several tracts of land first above-mentioned or any other of the lands aforesaid, so as to and for the purpose of defeating the rights of said William A. Simpson and Samuel N. Simpson therein, all which they did fraudulently and for the purpose of cheating and defrauding said William A. Simpson and Samuel N. Simpson out of said several tracts of land.

And the defendants say that afterwards, on the 28th day of March, 1868, while the said William A. Simpson was in possession of the several tracts of land, said Caldwell and his wife by deed pretended to convey to the plaintiffs the land described in their petition herein, fraudulently, for the purpose of cheating and defrauding said William A. Simpson out of said *said* several tracts of land.

And the defendants further aver that said plaintiffs took said deed with notice and full knowledge of the rights of the said William A. Simpson in the premises, and of all the matters and things hereinbefore alleged, and that they, said plaintiffs, paid no consideration for said land, but that said Caldwell and the plaintiffs, confederating together to cheat and defraud defendant, William A. Simpson, out of said land, with the understanding and agreement that if they shall fail to recover said land from said defendant, William A. Simpson, they shall pay no consideration for said land to said Caldwell.

94

And these defendants further aver that said Caldwell so made and executed the last-mentioned deed for the purpose of putting the legal title of said several tracts of land out of himself into said plaintiffs, so that they could recover said lands from these defendants for the purpose of getting rid of the effect of the contract mentioned in the deed first aforesaid and above copied next after the copy of said deed above set forth, all of which said plaintiffs well knew when said Caldwell made said deed, and they then had notice thereof; and said defendants further aver that on and ever since the 28th day of May, A. D. 1867, aforesaid, said William A. Simpson has, by tenants, been in possession of said several tracts of land, improving, cultivating, raising crops on, and inhabiting the same.

95

And said defendants further aver that said David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barratt, N. E. Excendine, Joseph Leon, and H. Cochran, defendants, herein are as tenants of said William A. Simpson in possession of said several tracts of land, and have large and valuable growing crops thereon, and hold the same by lease from said William A. Simpson.

And said defendants further aver that said plaintiffs fraudulently set up said deed, and claim title to said lands under the same, and by virtue thereof, fraudulently claim an estate and interest in said lands adverse to said defendants.

Wherefore the said defendants herein, and each of them, pray and demand judgment against the plaintiffs herein, and each of them, that they, the said plaintiffs, be enjoined and restrained from ever claiming, suing for, or setting up title to said several tracts of land, or any or either of them, or any part or portion thereof, and that the pretended estate and interest of said plaintiffs, and each of them therein, be determined and wholly for naught held.

96

NELSON COBB,
CLOUGH AND WHEAT, AND
GRISWOLD AND BUTTON,
Att'ys for Defendants.

Upon which are the following indorsements:

No. 2998. Shoemaker, Miller & Co. v. W'm A. Simpson et al. Answer to amended petition, &c.—Filed June 8, 1870. H. J. Dennis, clerk.

97

And be it further remembered that afterwards, on the 29th day of June, A. D. 1870, in pursuance of leave of said court, first

given for such purpose with consent of said defendants, the plaintiffs in said action therein filed their reply to the last-mentioned answer, of which said reply and of the exhibits and affidavits thereto annexed, and of the indorsements thereon, the following is a copy, to wit:

Reply to answer to amended petition.

THE STATE OF KANSAS,
Leavenworth County, ss:

In the district court sitting in and for the county of Leavenworth.

CARLOS S. GREEDY, S. M. EDGELL, William M. McPherson, Robert E. Carr, Edward Millar, Matthew Baird, R. M. Shoemaker, and William Kenney, partners as Shoemarker, Millar & Co., plaintiffs,
versus
98 WILLIAM A. SIMPSON, DAVID ACKERS, William R. Smith, George Arbold, H. Johnston, Andrew Barratt, N. V. Excendine, Joseph Leon, and H. Cochran, defendants.

And now come the said plaintiffs, and for reply to the second ground of defense, in the answer to the amended petition, admit that the several tracts of land described in the petition, are part and parcel of the lands mentioned in the treaty mentioned in said answer as concluded July 4th, A. D. 1866, and that said lands mentioned in the second article of said treaty, and are not any part of the mill reservation nor blacksmith's shops; that the Secretary of the Interior, on the eleventh day of August, A. D. 1866, gave the notice specified in said answer; that the Missouri River Railroad Company filed the bond as in said answer alleged; that on the thirty-first day of August, A. D. 1866, the written instrument, as alleged, was made as in said answer alleged.

99 And further replying said plaintiffs deny that on the twenty-first day of February, A. D. 1867, or at any other date, the Missouri River Railroad Company made, executed, sealed, or delivered to one Samuel N. Simpson, the written instrument called a deed, described in the said answer as having been made on that day, and deny that L. T. Smith, as president of said railroad company, or otherwise, was the agent of said company to execute said written instrument, or was, by said company, authorized or empowered, in any way whatever, to execute said written instrument.

And further replying, said plaintiffs deny that on the said twenty-first day of February, A. D. 1867, or at any other date, the Missouri River Railroad Company made or executed the written instrument in said answer described and set forth as having been on that day made and executed by L. T. Smith, president and agent, and Alexander Caldwell, by the name and description of A. Caldwell, vice president, and Samuel N. Simpson, by the name of S. N. Simpson, and deny that said L. T.

100 Smith was the agent of said railroad company to execute said written instrument, or was by said company authorized or empowered, in any way whatever, to execute said written instrument, and further deny that said Alexander Caldwell was ever in any way authorized and empowered by said railroad company to execute said written instrument.

And the plaintiff further replying, deny that the certain written instrument alleged in said answer to have been executed on the 10th day of May, A. D. 1867, was executed by these plaintiffs, or either, or any of them, and deny that the said E. M. Bartholow, in said answer mentioned, was the agent of these plaintiffs to execute said written instrument, or was by said plaintiffs, or any of them, authorized or empowered to execute the same; and said plaintiffs allege that the said written instrument has no connection with or reference to the subject-matter of this action, but relates wholly to other matters; and said plaintiffs allege that on the day of the date of said last-mentioned written instrument, the right of the Indians to the said land had not been extinguished.

101 And said plaintiffs, further replying, admit the execution of the written instrument alleged to have been made on the 28th day of May, A. D. 1867, but allege that the same was made and executed to the defendant, William A. Simpson, who was the brother of S. N. Simpson, without any consideration whatever, and in collusion with his said brother, for the purpose of complicating the title of the lands in controversy in this action, and embarrassing the plaintiffs in their recovery in this action; and plaintiffs further admit the issuing of the patent in said answer described to Alexander Caldwell, and the making and the delivery of the deed, in said answer described by Alexander Caldwell and wife, to the plaintiffs herein.

And said plaintiffs further allege that, at the time of the making of the pretended deed of the Missouri River Railroad Company to S. N. Simpson, as in the answer set forth, there was no good and valuable consideration passing from said Simpson to said company, and said pretended deed was made without any consideration whatever, all of which was well known to the said William A. Simpson at the time and at the date of the deed from Samuel N. Simpson to William A. Simpson.

102 And said plaintiffs further allege that, at the time of the making of the pretended written instrument, of date of 21st of February, A. D. 1867, referred to and specified in said answer as having been signed by L. T. Smith and A. Caldwell, there was no good or valuable consideration passing from said Simpson to said railroad company, or to said Smith and Caldwell, or either of them, and said pretended written instrument was made without any consideration whatever, all of which was well known to said William A. Simpson at the time and at the date of the deed from Samuel N. Simpson to William A. Simpson.

And said plaintiffs further allege that, on the twenty-ninth day of October, 1866, the said Alexander Caldwell, mentioned in said answer, and these plaintiffs, made and executed their certain written instruments, of which a copy is hereto annexed, made part hereof, and marked "Exhibit A.;" that the lands in the petition mentioned are part of the lands in the said last-mentioned written instrument de-

103 scribed, and were elected by said plaintiffs within ninety days from the date of the said written instrument, of the making of which written instrument, and the existence of the same, and of the selection of the said lands as aforesaid, said Samuel N. Simpson and William A. Simpson and the defendants herein, had had due and full notice at the time of the alleged execution of the written instruments dated 21st February, 1867.

And said plaintiffs further allege that the said deed of conveyance from A. Caldwell and wife to these plaintiffs, was made, executed, and

delivered in pursuance of the said written instrument dated 29th October, 1866.

And said plaintiffs further allege that, in pursuance of said written instrument, and upon the execution and delivery of the deed from A. Caldwell and wife to them, they paid the full price and value of said land to said Caldwell, according to the terms of said written instrument, to wit, twenty dollars per acre for all of said lands.

And said plaintiffs further allege that, at the date of said last-mentioned written instrument, to wit, the 29th of October, 1866, none of the transactions mentioned in said second ground of defense, partici-
104 pated in by said Samuel N. Simpson and William A. Simpson, L. T. Smith and Alexander Caldwell, as therein alleged, had occurred.

And said plaintiffs further allege that the possession of the said Simpson of said lands was wrongful and unlawful; that said Samuel N. Simpson took possession of the same before the Indians to whom the same had been allotted had elected under treaty July 4, 1866, to remove, and before the improvements in the answer mentioned were appraised, and said plaintiffs deny all knowledge of the existence of said pretended deed of date 21st Feb'y, 1867, or of the other written instrument of said last-mentioned date.

And plaintiffs further replying, say that, on the said 21st day of February, A. D. 1867, and for a long time thereafter, the lands in controversy were held and possessed by various members of the Delaware tribe of Indians under allotments made in pursuance of the terms
105 of the treaty of A. D. 1866, and deny that the said Missouri River Railroad Company, the said L. T. Smith or A. Caldwell, or any or either of them had any right, title, or interest in said lands at the date last aforesaid, except the right to purchase according to the terms of the treaty of A. D. 1866, all of which was well known to the said S. N. Simpson.

And said plaintiffs, further replying, deny each and every allegation in said answer contained not hereinbefore specifically admitted, except that defendants are and were at the time of the commencement of this action in possession of the lands in controversy.

ROBERT CROZIER, AND
THOMAS P. FENTON,
Att'ys Pl'ffs.

THE STATE OF KANSAS, *Douglas County, ss:*

W. A. Harris, being duly sworn according to law, doth depose and say that he is the agent of the plaintiffs in the action above entitled; that the reason that the affidavits to the foregoing reply is not made by said plaintiffs or one of them, is that they are all non-residents of Leavenworth County, and are absent from said county and State
106 of Kansas; that affiant has read the foregoing reply and knows the contents thereof, and believes the facts, allegations, and denials therein stated are true.

W. A. HARRIS.

Sworn to before me and subscribed in my presence this 28th day of June, 1870.

[NOTARIAL SEAL.] W'M H. ABRAMS,
Notary Public Douglas County, Kansas.

"A."

Article of agreement made and entered into this twenty-ninth day of October, A. D. 1866, between Alexander Caldwell, of the city of Leavenworth, State of Kansas, party of the first part, and the firm of Shoemaker, Miller and Co., a firm composed of R. M. Shoemaker and others, parties of the second part, witnesseth, that said party of the first part doth hereby agree with the said parties of the second part to sell to them or their assigns, eight thousand acres of timber-land, of the Delaware Deminished Reserve, in Kansas, the parties of the second
107 part to have the *the parties of the second part to have the* privilege of making it ten thousand acres, (10,000;) said lands to be selected by the said parties of the second part in full half sections, as fixed by Government survey, and fractions of sections where they occur according to Government survey, within ninety (90) days from the date hereof, said lands to be contiguous to the line from Wyandotte to Lawrence, of the Union Pacific Railroad, E. D., and to be selected out of the sixteen thousand acres of land designated on the map of the land by the parties of the second part, in Philadelphia, in February last, a copy of which map is hereto attached, and it is distinctly understood and agreed that in case the party of the first part should be unable to make good and sufficient titles to any of the lands so selected, then the parties of the second part shall select from other timber-lands within the limits of the "Delaware Deminished Reserve," in half sections or fractions, as heretofore provided, an equal amount in lieu thereof. And that he, the said party of the first part, will, as soon as he shall obtain titles to said lands from the United States, and on receiving from
108 the said parties of the second part the sum of twenty dollars, ($20) per acre therefor, at his own cost and expense, execute a proper conveyance for the conveying and assuring the fee-simple of the lands to the said parties of the second part or their assigns, free from all encumbrances, which conveyance shall contain a general warranty and the usual full covenants. And the said parties of the second part hereby agree to make the selections of such portions of said land as they desire for immediate use to cut timber or ties from within ten (10) days from the date of this agreement, and to complete the selections of all the lands to be purchased under this agreement, and furnish the party of the first part with a description thereof, within ninety (90) days from the date hereof, and that they will, on the execution and delivery of such conveyance of such lands, from time to time pay unto said party of the first part therefor the said sum of twenty dollars per acre.

And it is further agreed by and between the parties hereto that the said parties of the second part shall at all times have the right of ingress and egress to and from said lands so to be selected and con-
109 veyed, and also to enter upon said lands at any time after such selection shall be made, for the purpose of cutting timber for use and building and constructing the Union P. R. R., E. D.; provided, however, that such right shall be contingent upon the strict compliance on the part of the said parties of the second part with all the stipulations contained in this agreement.

And it is further understood and agreed that the said parties of the second part shall purchase and pay for said lands at the price hereinbefore stated from time to time as the party of the first part shall be able to make and shall make to the parties of the second part, good and sufficient titles to the same or any half section or fractions of sections.

And it is further hereby agreed and understood that, in consideration

of the mutual agreement hereinbefore recited, all ties and other timbers cut or removed or to be removed from the said "Delaware Deminished Reserve," (except from lands selected or to be selected and purchased under this agreement,) between the thirty-first day of August last and the date hereof, by the parties of the second part, their
110 sub-contractors, agents, or servants, if unpaid to other parties at this date shall be paid for by the said parties of the second part to the said party of the first part, at the same prices as had been agreed upon to be paid to other parties under certain permits so called, and heretofore issued, the party of the first part indemnifying the parties of the second part against any claims or demands made by other parties for said ties or timber so paid for to him.

And the parties of the second part hereby agree that they will not in any manner do any act or other thing to prevent said parties of the first part, or the Missouri River Railroad Company, from obtaining said lands under treaty dated July 4th, 1866, but will give such reasonable aid as may be right and proper to have the stipulations of said treaty carried out without delay.

And it is further understood and agreed that said parties of the second part shall not, from this date forward, cut or remove any timber or other material from, or in any manner trespass upon, any part of the lands of the Delaware Deminished Reserve, except those purchased
111 and to be selected under this agreement.

It is also further agreed that the parties of the second part, their sub-contractors or agents, or the Union P. R. R. Co.'s E. D., shall not become purchasers of timber or timber land from the Indians on said Delaware Deminished Reserve.

It is further agreed that, if from any just cause whatever, said Alexander Caldwell shall not obtain, under treaty aforesaid or otherwise, the legal title to said lands, then he shall in any manner be liable to the parties of the second part or their assigns for any default in carrying out the stipulations of this agreement, and then, and in that case, the parties of the second part shall be relieved from the obligations of this contract.

In testimony whereof the parties hereto have affixed their signatures this day and date above written.

A. CALDWELL.
SHOEMAKER, MILLER & CO.

In presence of—
ROB'T CROZIER.

It is understood by the parties to the foregoing agreement, that the last clause thereof shall *shall* be so construed as to release either party from the stipulations thereof only so far as the particular
112 tracts selected in pursuance of the same to which the party of the first part may be unable to make conveyance are concerned.

A. CALDWELL.
SHOEMAKER, MILLER & CO.

Attest:
ROB'T CROZIER.

Upon which are the following indorsements:

No. 2998. Shoemaker, Miller and Co., vs. William A. Simpson et al. Reply to answer to amended petition. Filed June 29th, 1870. H. J. Dennis, clerk. Crozier and Fenlon, plff's att'ys.

113 And be it further remembered that, at the September term, A. D. 1870, of the district court of the first judicial district of the State of Kansas, sitting in the county of Leavenworth, said action came on for trial in said court, the said trial being the second trial had in said action, said action having been before tried, and another trial demanded and allowed, as provided by law, (such previous trial was had before the petition aforesaid was amended as aforesaid,) and the parties plaintiffs and defendants waived a jury, and submitted said action to the court for trial.

And thereupon the trial of said action was proceeded with, and the said plaintiffs, to maintain the issue on their part, offered to read in evidence a patent from the United States to Alexander Caldwell for ninety-two thousand five hundred and ninety-eight and $\frac{33}{100}$ acres of land, the same being the lands mentioned in the second article of the treaty between the Government of the United States and the Delaware tribe of Indians, concluded on the 4th day of July, A. D. 1866, as being the then remaining part of the reservation therein mentioned.

114 And said plaintiffs then, with said patent, offered to read in evidence *of* a certificate of the record thereof, made by one John Wolkiewicz, as register of deeds in and for said county of Leavenworth, to which certificate, and to the same being read in evidence, said defendants then objected, and said defendants then offered to read in evidence and show to the court a certain written demand, made by the attorneys in said action of said defendants, of which written demand the following is a copy, to wit:

THE STATE OF KANSAS,
Leavenworth County:

In the district court.

CARLOS S. GREELEY, S. M. EDGELL, W'M M. McPherson, Robert E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker, and N. Kenney, partners as Shoemaker, Miller & Co.,
vs.
WILLIAM A. SIMPSON, DAVID ACKERS, W'M A. Smith, George Arbold, H. Johnson, Andrew Barratt, N. Excendine, Joseph Leon, H. Cochran.

The defendants in the above-entitled action, and each of them,
115 and the undersigned, their attorneys therein, hereby require and demand of and from the plaintiffs above named, and each of them, and of Robert Crozier and Thomas P. Fenlon, their attorneys in said action, that said plaintiffs, and also their said attorneys, deliver to the undersigned or to one of them, a copy of the last contract mentioned in the deposition of R. M. Shoemaker, heretofore taken in this cause, and also a copy of each and every deed or other writing which said plaintiffs intend to offer in evidence on the trial of the action; and you are requested to deliver the same forthwith.

Oct. 28, '69.

NELSON COBB,
CLOUGH AND WHEAT,
GRISWOLD AND BRITTON,
Att'ys for Def'ts.

And said plaintiffs, by their attorneys in this said action, then admitted that said demand was made and served on the attorneys in this action of and for said plaintiffs, on the 28th day of October, A. D. 1869,

and it was then admitted by both plaintiffs and defendants, that
116 the patent aforesaid and the deed hereinafter mentioned, from Alexander Caldwell and wife to plaintiffs, that is, the first deed hereinafter mentioned, and the contract mentioned in the last reply filed in said action as having been made on the 29th day of October, A. D. 1866, and referred to therein as the "Exhibit A," thereto annexed, were, on the 8th day of November, A. D. 1869, excepted from the operation and effect of said written demand.

And it was then further admitted by said plaintiffs that they had not, and that their attorneys had not, furnished or delivered to said defendants or any of them, or to any of the attorneys of said defendants, a copy of any deed or other writing.

And said defendants then objected to said certificate being read in evidence, because a copy thereof had not been furnished or delivered as required, which objection was then by said court overruled, to which ruling and decision of the court said defendants then excepted.

And then said plaintiffs read said patent and said certificate in evidence, of which patent and of said certificate the following is a

117 copy, with the exception that in the place in said patent where all the lands aforesaid are described there is the parenthesis and the words, "Here follows description of the lands," shown by the said copy as follows, to wit:

118[1] Whereas, by the second article of the treaty concluded on the 4th day of July, 1866, between the United States and the Delaware tribe of Indians, as ratified on the 10th day of August, 1866, the Secretary of the Interior is "authorized to sell to the Missouri River Railroad Company, or other responsible party or parties, in a body," all that part of the Delaware Indian reservation, in the State of Kansas, not heretofore sold to the Leavenworth, Pawnee and Western Railroad Company, "being the lands conveyed to said Delaware Indians in pursuance of the provisions of the supplemental treaty of September twenty-fourth, eighteen hundred and twenty-nine, and all other lands owned by the said tribe in the State of Kansas, not previously disposed of, except as "thereinafter provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements."

And whereas it appears from a return dated October 17, 1867, from the Secretary of the Interior to the Commissioner of the General Land-Office, that "the Missouri River Railroad Company has, through its assignee, Alexander Caldwell, complied with the terms and conditions of the contract made by said company with the late Secretary of the Interior, Hon. James Harlan, for the purchase of the Delaware Diminished Reserve in Kansas, under the provisions of the "aforesaid treaty concluded with the Delaware Indians July 4, 1866," said return being accompanied by a "list of lands within the Delaware diminished reservation, to be conveyed by patent to the Missouri River Railroad Company, or its assigns."

And whereas the said list has been approved by the Secretary of the Interior, with directions to the Commissioner of the General Land-Office, "to cause a patent to be issued in favor of Alexander Caldwell, assignee of the Missouri River Railroad Company," for the lands described therein, containing, in the aggregate, ninety-two thousand five hundred and ninety-eight acres and thirty-three hundredths of an acre, situated south of the base-line and east of the sixth principal meridian, in the State of Kansas, and being described as follows, to wit:

(Here follows description of the lands.)

Now, know ye, that the United States of America, in consideration of the premises, and pursuant to the treaty, the approval and order aforesaid, have given and granted, and by these presents do give and grant, unto Alexander Caldwell, assignee of the Missouri River Railroad Company, and to his heirs, the tracts of land above described.

To have and to hold the said tracts, with the appurtenances, unto the said Alexander Caldwell, assignee of the Missouri River Railroad Company, and to his heirs, and assigns forever.

119² In testimony whereof I, Andrew Johnson, President of the United States, have caused these letters to be made patent, and the seal of the General Land-Office to be hereunto affixed.

Given under my hand at the city of Washington, this twenty-sixth day of October, in the year of our Lord one thousand eight hundred and sixty-seven, and of the Independence of the United States the ninety-second.

[SEAL.] By the President: ANDREW JOHNSON,
By FRANK COWAN,
Secretary.

Recorded vol. 12, pages 321 to 337.

I. N. GRANGER,
Recorder of the General Land-Office.

OFFICE OF THE REGISTER OF DEEDS,
City and County of Leavenworth, State of Kansas, ss:

I, John Wolkiewicz, register of deeds within and for the county aforesaid, do hereby certify that the within and foregoing instrument of writing was received by me for record this ninth day of April, A. D. 1868, at 1½ o'clock p. m., and that the same is duly recorded in book 18, for recording conveyances, at pages from 210 to 219.

In testimony whereof I have hereunto set my hand and official seal the day and year aforesaid.

[SEAL.] (Signed) JOHN WOLKIEWICZ,
Register of Deeds,
By THOMAS PLOWMAN, *Deputy.*

Plaintiffs then offered and read in evidence a deed, dated December 26, 1870, from Alexander Caldwell and wife to the plaintiffs in this action, of land in controversy, among others, together with the certificate of record attached to the deed, a copy of which papers is as follows, to wit:

"This indenture, made this twenty-sixth day of December, in the year of our Lord one thousand eight hundred and sixty-seven, between Alexander Caldwell and P. A. Caldwell, his wife, of the city and county of Leavenworth, State of Kansas, of the first part, and R. M. Shoemaker, Edward Miller, Carlos S. Greeley, S. M. Edgell, Robert E. Carr, William M. McPherson, J. W. Kinney, and Matthew Baird, partners, as Shoemaker, Miller, & Co., parties of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one hundred and sixty thousand four hundred and sixty-five dollars and forty cents, to him in hand paid by the parties of the second part, the receipt whereof is hereby confessed and acknowledged, do, by these presents, grant, bargain, sell, remise, release, alien, convey, and confirm unto the said parties of the second part, and to their heirs and assigns

forever, all of the following described pieces and parcels of land lying and situate in the counties of Leavenworth and Wyandotte, and State of Kansas, being a part of the lands of the "Delaware Diminished Reserve," to wit: The northeast fractional quarter of section twenty-seven, town. 12, range 20, containing $148\frac{40}{100}$ acres; the east half of the northwest quarter of section twenty-seven, town. twelve, range twenty, containing eighty acres; the southwest fractional quarter of section twenty-seven, town. twelve, range twenty, containing $158\frac{80}{100}$ acres; the southeast fractional quarter of section twenty-seven, town. twelve, range twenty, containing $25\frac{50}{100}$ acres; the northwest fractional quarter of section thirty-four, town. twelve, range twenty, containing $50\frac{40}{100}$ acres; the whole of section twenty-two, town. twelve, range twenty, containing 640 acres; the east half of section twenty-three, town. twelve, range twenty, containing 320 acres; the whole of section twenty-four, town. twelve, range twenty, containing 640 acres; the northwest fractional quarter of section twenty-six, town. twelve, range twenty, containing $132\frac{60}{100}$ acres; the east half of the northeast quarter of section twenty-six, town. twelve, range twenty, containing 80 acres; the northwest quarter of the northeast quarter of section twenty-six, town. twelve, range twenty, containing 40 acres; the northeast fractional quarter of the southeast fractional quarter of section twenty-six, town. twelve, range twenty, containing $38\frac{30}{100}$ acres; the west half of the southwest fractional quarter of section twenty-five, town. twelve, range twenty, containing $43\frac{10}{100}$ acres; the south half of fractional section thirty, town. twelve, range twenty-one, containing $314\frac{46}{100}$ acres; the north half of the northwest quarter of section twenty-eight, town. twelve, range twenty-one, containing $77\frac{80}{100}$ acres; the northeast fractional quarter of section twenty-eight, town. twelve, range twenty-one, containing $18\frac{40}{100}$ acres; the west half of the southeast fractional quarter of section twenty-two, town. twelve, range twenty-one, containing $79\frac{50}{100}$ acres; the northeast quarter of the southeast fractional quarter of section twenty-two, town. twelve, range twenty-one, containing 40 acres; the south half of the northwest quarter of section twenty-three, town. twelve, range twenty-one, containing 80 acres; the southwest quarter of section twenty-three, town. twelve, range twenty-one, containing 160 acres; the east half of northwest fractional quarter of section twenty-six, town. twelve, range twenty-one, containing 80 acres; the southwest fractional quarter of section twenty-six, town. twelve, range twenty-one, containing $37\frac{80}{100}$ acres; the southeast fractional quarter of section twenty-six, town. twelve, range twenty-one, containing $112\frac{60}{100}$ acres; the northeast quarter of section twenty-six, town. twelve, range twenty-one, containing 160 acres; the northwest fractional quarter of section twenty-five, town. twelve, range twenty-one, containing $103\frac{10}{100}$ acres; the southwest fractional quarter of section twenty-five, town. twelve, range twenty-one, containing 7 acres; the west half of the southwest fractional quarter of section twenty-four, town. twelve, range twenty-one, containing 80 acres; the north half of section thirteen, town. twelve, range twenty-one, containing 320 acres; the northwest quarter of the southwest quarter of section thirteen, town. twelve, range twenty-one, containing 40 acres; the north half of the southeast fractional quarter of section thirteen, town. twelve, range twenty-one, containing 80 acres; the southeast fractional quarter of the southeast fractional quarter of section thirteen, town. twelve, range twenty-one, containing $30\frac{60}{100}$ acres; the west half of fractional section eighteen, town. twelve, range twenty-two, containing $258\frac{30}{100}$ acres; the northwest quarter of the southeast fractional quarter of sec-

120[3]

tion eighteen, town. twelve, range twenty-two, containing 40 acres; the southwest quarter of section seventeen, town. twelve, range twenty-two, containing 160 acres; the northwest fractional quarter of section twenty, town. twelve, range twenty-two, containing $45\frac{50}{100}$ acres; the northeast fractional quarter of section twenty, town. twelve, range twenty-two, containing $91\frac{40}{100}$ acres; the west half of fractional section one, town. twelve, range twenty-two, containing $222\frac{60}{100}$ acres; the southeast quarter of fractional section twenty-one, town. twelve, range twenty-two, containing $159\frac{80}{100}$ acres; the northeast quarter of fractional section twenty-one, town. twelve, range twenty-two, containing 160 acres; the northeast fractional quarter of section twenty-eight, town. twelve, range twenty-two, containing $33\frac{60}{100}$ acres; the northwest fractional quarter of section twenty-seven, town. twelve, range twenty-two, containing $34\frac{20}{100}$ acres; the southwest fractional quarter of section twenty-two, town. twelve, range twenty-two, containing $159\frac{90}{100}$ acres; the southeast fractional quarter of section twenty-two, town. twelve, range twenty-two, containing $108\frac{20}{100}$ acres; the west half of the northwest quarter of section twenty-two, town. twelve, range twenty-two, containing 80 acres; the east half of the northeast quarter of section twenty-two, town. twelve, range twenty-two, containing 80 acres; the whole of fractional section twenty-three, town. twelve, range twenty-two, containing $114\frac{90}{100}$ acres; the southwest 121^4 fractional quarter of section thirteen, town. twelve, range twenty-two, containing $112\frac{50}{100}$ acres; the southeast quarter of section thirteen, town. twelve, range twenty-two, containing 160 acres; the northwest quarter of section thirteen, town. twelve, range twenty-two, containing 160 acres; the north fractional half of section twenty-four, town. twelve, range twenty-two, containing $172\frac{50}{100}$ acres; the south fractional half of section twenty-four, town .twelve, range twenty-two, containing $117\frac{50}{100}$ acres; the northwest fractional quarter of section nineteen, town. twelve, range twenty-three containing $49\frac{50}{100}$ acres; the southwest fractional quarter of section eighteen, town. twelve, range twenty-three, containing $144\frac{50}{100}$ acres; the east half of the northwest quarter of section eighteen, town. twelve, range twenty-three, containing 80 acres; the southwest quarter of the northwest quarter of section eighteen, town. twelve, range twenty-three, containing 40 acres; the northeast fractional quarter of section eighteen, town. twelve, range twenty-three, containing 62 acres; the east half of the southwest quarter of section seven, town. twelve, range twenty-three, containing 80 acres; the northwest quarter of the southwest quarter of section seven, town. twelve, range twenty-three, containing 40 acres; the southeast fractional quarter of section seven, town. twelve, range twenty-three, containing 89 acres; the northwest quarter of section seven, town. twelve, range twenty-three, containing 160 acres; the northeast fractional quarter of section seven, town. twelve, range twenty-three, containing $114\frac{80}{100}$ acres; the southwest fractional quarter of section six, town. twelve, range twenty-three, containing $156\frac{91}{100}$ acres; the southeast fractional quarter of section six, town. twelve, range twenty-three, containing $149\frac{83}{100}$ acres; the northeast fractional quarter of section six, town. twelve, range twenty-three, containing $157\frac{1}{100}$ acres; and the southwest fractional quarter of section five, town. twelve, range twenty-three, containing fifteen and one half ($15\frac{50}{100}$,) making in the aggregate eight thousand twenty-three acres and twenty-seven hundredths of an acre, ($8{,}023\frac{27}{100}$.) Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining: To have and to hold the said premises with the hereditaments and appurtenances, unto the

said parties of the second part, their heirs and assigns forever; and the said Alexander Caldwell, for himself and his heirs, does hereby covenant to and with the said parties of the second part, their heirs and assigns, that he is lawfully seized of the premises aforesaid, that the said premises are free and clear of and from all encumbrances whatsoever; and that he will forever warrant and defend the same, with the appurtenances, unto the said parties of the second part, their heirs and assigns forever, against the lawful claim of all persons whomsoever.

In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

A. CALDWELL. [SEAL.]
PEACE A. CALDWELL. [SEAL.]

Sealed and delivered in presence of—
[Interlineations made before signing.]
W'M A. MARTIN,
A. H. GILKESON.

STATE OF KANSAS, *Leavenworth County, ss:*

Be it remembered that, on this twenty-sixth day of December, A. D. eighteen hundred and sixty-seven, before me, the undersigned, a notary public in and for the county and State aforesaid, came Alexander Caldwell and Peace A., his wife, who are personally known to me to be the identical persons whose names are affixed to the foregoing instrument of writing as grantors, and severally acknowledged the same to be their own voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year last written.

[SEAL.] A. H. GILKESON, *Notary Public.*

122[5] OFFICE OF REGISTER OF DEEDS,
City and County of Leavenworth, State of Kansas, ss:

I, John Wolkiewicz, register of deeds within and for the county aforesaid, do hereby certify that the within and foregoing instrument of writing was received by me for record this 25th day of April, A. D. 1868, at eleven o'clock a. m., and that the same is duly recorded in Book "16," for recording conveyances, at pages 616, 617, 618, and 619.

In testimony whereof, I have hereunto set my hand and official seal the day and year aforesaid.

[SEAL.] JOHN WOLKIEWICZ,
Register of Deeds.

ALEXANDER CALDWELL, being called by pl'ff, and duly sworn, testified as follows:

Question. This deed purports to be made by yourself to R. M. Shoemaker and others, of the land in controversy. State what was paid to you for those lands.

Answer. I received the sum of twenty dollars an acre for the land, as specified in that deed.

Q. Who from?
A. Shoemaker, Miller & Co.
Q. The grantees in this deed
A. Yes, sir.

E. M. BARTHOLOW, being duly sworn, testified as follows:

Question. Are you familiar with what are known as the Simpson lands, the lands in controversy in this action, the Sarcoxie place?

Answer. Yes, sir; I know something of it.

Q. What is the rent of cultivated bottom lands in that vicinity worth per acre per year?

A. I think about five dollars per acre.

Q. What is wood worth per cord in the tree, that near Lawrence?

A. I don't know that I am capable of judging.

Q. What is it worth, according to your best judgment?

A. I suppose about one dollar per cord, in the tree.

Q. How do you arrive at the conclusion that wood was worth that much?

A. From conversations I have had with persons who cut wood from the Delaware lands, and what they offered me for wood.

Q. What was it worth to cut wood?

A. I don't know; I think about one dollar a cord.

Q. What was it worth to haul it?

A. I don't remember distinctly; I have had persons offer to haul it for me, I think, for about two dollars a cord.

Q. So you think it would be worth one dollar a cord in the tree?

A. I judge it would.

Q. Taking your knowledge of the timber growing in that district, what, in your judgment, would that timber land yield per acre?

A. There is such a variety of kinds of timber land it would be hard to judge.

Q. Did you observe any wood piled up on that land after the Simpsons got it, since 1867?

A. I know but very little about the Simpsons' ownership of that land. I have noticed wood piled there in passing.

WILLIAM H. ABRAMS, being duly sworn, testified as follows:

Question. Where do you reside?

Answer. In Lawrence.

Q. Are you acquainted with the land in controversy?

A. Yes, sir.

Q. Have you been often on it?

A. Yes, sir; I have passed over the land a number of times.

Q. What is your estimate of the number of acres of timber cut off of it?

A. I think the land was all timber land at one time, or nearly all. One 80 was half timber and one-half prairie.

Q. Has there been any timber cut off?

A. Yes, sir.

Q. How many acres, do you estimate?

A. I could not estimate.

123[6] Q. Approximate it as near as you can.

A. I should think the timber had been cut off three-fourths of the land.

Q. Are you agent for that land for Mr. Shoemaker?

A. Yes, sir; I have been since some time in 1868.

Q. Did you know it in December, 1867?

A. Yes, sir; but I had not then been appointed agent for the land.

Q. What proportion of the timber has been cut since December, 1867?

A. One-half of it I should say.

Q. Was there any hewing-timber, or sawing-timber, or wood?
A. Mostly wood.
Q. How many cords of wood would it yield per acre?
A. I have no means of knowing.
Q. Have you any judgment about it?
A. I have not as to the yield per acre.
Q. Can you make an estimate of the whole amount that has been cut off?
A. I cannot.
Q. How much of the land has been in cultivation during 1868 and 1869?
A. I think at least four hundred acres of it.
Q. What is it worth per acre?
A. After it is in cultivation $3 per acre would be a low rental value.
Q. Could you not make some estimate of what timber was on it?
A. I owned an adjoining piece of land and had the timber cut off of it. It had the best of the timber cut off of it. The timber which remained was only suitable for fire-wood. Off about 80 acres of land I believe I got something over 600 cords of wood.
Q. Was this about the same average timber?
A. Yes, sir, about the same, or rather better than my timber.
Q. Have you got yours clean?
A. No, sir.
Q. Suppose it was taken off as clean as they have taken this, how much would it yield?
A. I think I could get another hundred cords off of it.

ALEXANDER CALDWELL, being recalled, testified as follows:

Question. When was the money paid to the Government which this patent recites?
Answer. About the middle of October, 1867.
Q. How many days before the issue of the patent?
A. It must have been about ten days before.
Q. Who paid it?
A. I did.
Q. Did the Missouri River Railroad Company pay any part of it?
A. No, sir.
Q. You paid two dollars and a half an acre, and for the improvements?
A. Yes, sir.

Cross-examination:

Question. Who paid the money?
Answer. I paid it to the Government.
Q. From whom did you receive the money?
A. From my associates.
Q. Who were those associates?
A. There were quite a number of them. I can't tell them all without reference to the papers.
Q. Tell some of them.
A. Thomas A. Scott, of Philadelphia; Lucien Scott, of Leavenworth; Thomas L. Price, of Jefferson City; James Duffin, of Pennsylvania; John D. Perry, George Partridge, R. M. Shoemaker, David R. Garrison, C. H. Peck, and O. A. Hart, of St. Louis; Len. T. Smith, of Leavenworth, and myself. I believe that is all. There may be some more.

Q. What official capacity, as connected with the Missouri River Railroad Company, did L. T. Smith hold?

A. He was president the company.

(Plaintiffs objected to the last question and answer as incompetent and immaterial, and moved they be stricken out; which motion was by the court overruled; to which ruling of the court plaintiffs then excepted.)

Q. How long had L. T. Smith been president of the railroad company when this payment was made?

124[7] (Plaintiffs objected as incompetent; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. I don't know exactly how long; he was president in October, 1865.

Q. Was he president continuously from that time till 1867?

A. Yes, sir.

Q. What, if any, capacity as connected with the Missouri River Railroad Company, did you, or either of those associates you have named, occupy at the time that money was paid?

(Plaintiffs objected as incompetent and immaterial at this stage of the case; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. Some of them were directors of the railroad company.

Q. Which of them?

A. I can't tell without reference to the papers. Duffin was not; Perry was not; Shoemaker was not. Smith, Hart, Peck, Garrison, and myself were. Those are all I recollect..

Q. Was Lucien Scott?

A. Yes, sir.

Q. Was Thomas A. Scott?

A. I think not.

Q. Was Mr. Partridge?

A. No, sir.

Q. Was Mr. Greely?

A. No, sir.

Q. Was not M. H. Insley one of those associates?

A. Yes, sir.

Q. Was he not one of the directors of the railroad company?

A. I think he was.

Q. Was Geo. R. Taylor one of those associates?

A. Yes, sir.

Q. Was he one of the board of directors?

A. Yes, sir.

Q. Was E. H. Gruber one of the associates?

A. Yes, sir.

Q. Was Thomas Carney one of the associates?

A. I don't think he was.

Q. Was he one of the board of directors?

A. No, sir.

Q. How long had those men you have named as being directors been directors of the railroad company at that time?

A. From January, 1866, I think.

Q. You had been a director from 1866 to that time?

A. Yes, sir.

Q. Continuously up to this time, have you not?

A. Yes, sir.

Q. Are you acquainted with the value of land in this county?

A. Somewhat.

Q. Were you, in October, 1867, at the time you paid this money, acquainted with the value of the land described in this patent?

(Plaintiffs objected as immaterial and not a proper cross-examination; which objection was by the court sustained, because it is not cross-examination; to which ruling of the court defendants then excepted.)

Q. Who were the directors from January, 1866, to the time the money was paid to the Government of the United States for the lands specified in this patent?

(Plaintiffs objected as incompetent and not proper cross-examination; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. Were any other persons acting as directors of the Missouri River Railroad Company from January, 1866, to October, 1867, other than the persons you have already named as being directors of the company during that time?

(Plaintiffs objected as incompetent and not proper cross-examination; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. In what proportion did those persons who contributed that money contribute it?

A. I don't know as I can tell you exactly.

125[8] Q. Tell as near as you can.

A. There were thirteen original interests. I contributed one-thirteenth and one-third of one-thirteenth.

Q. How much did L. T. Smith contribute?

A. More than I did. He had one original interest as I had, but he contributed more.

Q. How much did he contribute at the time of the payment?

A. Two-thirteenths and one-third of one-thirteenth.

Q. How much did Lucien Scott contribute?

A. One-thirteenth.

Q. How much did Mr. Hart contribute?

A. One-fourth of three-thirteenths.

Q. How much did Mr. Peck contribute?

A. The same as Mr. Hart.

Q. How much did M. H. Insley contribute?

A. One-thirteenth interest. At the time of the payment I loaned him the money to pay it.

Q. That is in addition to what you mentioned before?

A. Yes, sir.

Q. How much did you pay for him?

A. Ten thousand dollars.

Q. That was for him?

A. Yes, sir.

Q. How much did Geo. R. Taylor contribute?

A. One-fourth of three-thirteenths.

Q. How much did D. R. Garrison contribute?

A. The same.

Q. How much did J. D. Perry contribute?

A. I think he contributed one twenty-sixth interest.

Q. How much did R. M. Shoemaker contribute?

A. One twenty-sixth.

Q How much did T. L. Price contribute?

A. One twenty-sixth.
Q. How much did E. H. Gruber contribute?
A. One-thirteenth was his original interest—that is the way I understand it.
Q. How about Thos. Carney?
A. He paid no money at all.
Q. That money you spoke of was contributed for the purchase of the land?
A. The money was raised in that way to pay for the land, and was used for that purpose.
Q. That purchase you speak of was the purchase recited in the patent to you?
A. Yes, sir.

Redirect examination:

Q. Those parties who contributed, do you know whether it was their individual money or not?
A. I know it was.
Q. Did the Missouri River Railroad Company have any money with which to make payment on that land at that time?
(Defendants objected as incompetent, irrelevant, and immaterial; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)
Plaintiffs here rested their case.

Said defendants then offered to read in evidence a contract, dated February 21, 1867, recorded March 31, 1867; the plaintiffs admitting that the words "Missouri River Railroad Co., by L. T. Smith, president," are the writing of said Leonard T. Smith; that the words "A. Caldwell, vice-president," are the writing of Alexander Caldwell; and that the signature, "S. N. Simpson," is the writing of Samuel N. Simpson; of which said contract, & of a certificate thereon, the following is a copy, to wit:

The Missouri River Railroad Company has, for a valuable consideration, this day made a deed of the following-described lands: The fractional part of section 34, town. 12, range 20, lying north of the Kansas River, and the south fractional half of section 27, town. 12, range 20, and the northeast fractional quarter and east half of the northwest quarter, section 27, town. 12, range 20, and the east half of the southeast quarter of section 22, town. 12, range 20, and the west fractional half of the northwest quarter of section 26, town. 12, range 20, and the south half of the northeast quarter of the northwest quarter, and the south fractional part of the east half of the northwest quarter of section 26, town. 12, range 20, containing $644\frac{22}{100}$ acres, all in the county of Leavenworth, to the said S. N. Simpson; and it is agreed by
126[9] said railroad company and the said Simpson that if said company shall not obtain a patent for any tract or all of said land described in said deed, they agreeing to use the same diligence to obtain title to the lands conveyed by said company, that is *and* by the company to obtain title to other lands purchased by said company under the contract of purchase of said Delaware Diminished Reserve, Kansas, aforesaid, pursuant to the terms of the treaty of July 4, 1866, the said company will allow the said Simpson to select other of said lands, equal in amount to the number of acres mentioned in said deed for which the company shall not acquire title, and the said company

will convey the same by good and valid deed to him; in the event of the failure of title the deed this day made of the lands to which said company has or shall obtain no title shall be void; and the said company agrees to give said Simpson a choice of any lands which they shall acquire the title to, not then sold under such contract of purchase, and to convey such lands in lieu of, and to an equal amount to, the lands described in a deed of this date to which the title of the company shall fail; and the said Leonard T. Smith, president, and Alexander Caldwell, vice-president, of said company, for and in consideration of the premises aforesaid, for themselves, jointly and severally, covenant and agree with the said Simpson that this agreement shall be well and truly kept by said railroad company.

In witness whereof we have hereunto set our hands and seals on this 21st day of February, A. D. 1867.

The interlin'ations between the tenth and eleventh lines were made before signing. Any improvements on the lands selected under this agreement to be paid for under the treaty before mentioned, the said Simpson shall pay for.

[L. S.] MISSOURI RIVER RAILROAD COMPANY,
By L. T. SMITH, *President.*
A. CALDWELL, *Vice-President.*

[U. S. stamp.]

Filed for record M'ch 31st, 1868, at 3 p. m.

S. N. SIMPSON.

OFFICE OF REGISTER OF DEEDS,
City and County of Leavenworth, State of Kansas, ss:

I, John Wolkiewicz, register of deeds within and for the county aforesaid, do hereby certify that the within and foregoing instrument of writing was received by me for record, this 31st day of March, A. D. 1868, at 3 o'clock p. m., and that the same is duly recorded in book Y, for recording agreements, etc., at page 553.

In testimony whereof I have hereunto set my hand and official seal the day and year aforesaid.

[SEAL.] JOHN WOLKIEWICZ,
Register of Deeds.
By THOMAS PLOWMAN, *Deputy.*

Plaintiff objected to its introduction because it is not shown that Smith, as president, or Caldwell, as vice-president, ever had any authority to make a conveyance, or an agreement to convey, the lands belonging to the railroad company, because this paper purports to be an agreement to convey certain lands, described in the patent; that this contract is dated February 21, 1867, and the patent was not issued till October, 1867; which objection was, by the court, overruled; to which ruling of the court, the plaintiffs then excepted. And said def'ts then read said contract & certificate in evidence.

Defendants then offered in evidence a certified copy of the record of the deed referred to in the contract last read in evidence, dated February 21, 1867. In connection with which offer the defendants offered preliminary proof to make it competent, as follows, to wit:

SAMUEL N. SIMPSON, being duly sworn, testified as follows:

Question. State if you are the person mentioned in this contract.
(The contract last mentioned was then shown to witness.)

Answer. I am.

127[10] Q. State if there was a deed signed by Leonard T. Smith, president of the Missouri River Railroad Company, at the time this contract was signed.

A. There was a deed signed at that time.

Q. Who signed it?

A. L. T. Smith.

Q. Was there a seal put to that paper?

A. There was.

Q. What seal?

A. The seal of the Missouri River Railroad Company.

Q. Was it the same seal that was affixed to this contract? (showing the last-mentioned contract as though referring thereto.)

A. Yes, sir; the same seal, at the same time, the same place—I saw it signed.

Q. Do you think this is a copy, or not, of the paper you call a deed, in this testimony?

A. This is a copy of the same deed.

Q. Who signed those words, "Missouri River Railroad Company, by L. T. Smith, president?"

A. It was written by L. T. Smith, in my presence.

Q. Have you that deed?

A. I have not.

Q. Where was it the last you knew of it?

A. I authorized my brother to send it over here to Clark & Co., to put it on record.

Q. Which brother?

A. William A. Simpson. I requested him to do it.

Q. When was that?

A. I don't remember just the time.

Q. It had not yet been put on record when you gave it to him?

A. No, sir.

Q. Have you ever seen it since?

A. No, sir.

Q. Do you know where it is?

A. I do not.

Q. Have you ever known its whereabouts since that time?

A. Not since I handed it to him, to be sent to Leavenworth to have it put on record.

Q. Have you searched among your papers for it?

A. I have.

Q. When?

A. A good many times.

Q. Within what length of time?

A. Within a year or a year and a half.

Q. What papers have you searched among?

A. I have made a diligent search among all my papers.

Cross-examination:

Question. Have you searched anywhere else for it?

Answer. I have searched everywhere I thought there was a possibility of finding it.

Q. Have you read this paper?

A. I did not read it now.

Q. Did you ever read it?

A. That is a copy.

Q. How do you know it is a copy?
A. I saw the paper.
Q. Have you read this paper?
A. I don't know.
Q. Don't you know that you have not read this identical paper?
A. That one you have in your hand, I don't say I have read, but I have read the deed.
Q. Don't you know that you have not read this paper?
A. I don't know.
Q. Did you ever have it in your hand except just now, when it was in your hand?
A. I think not; I don't know who handed it to you; I say it is a copy of the paper.
Q. How do you know it is a copy?
A. Because I dictated how the deed should be made.
Q. How do you know this is the paper?
A. I read part of it.
Q. What was in the deed?
A. A description of some land was in part of it.
Q. Do you know what land was in the deed?
A. I do.
Q. Describe it.
(Defendants objected as not cross-examination; which objection was by the court overruled; to which ruling of the court the defendants then excepted.)
A. They are in town. 12, range 20, and part of them are in section 26, part in section 34, and part in section 22.
Q. Have you any other description to give them?
A. No, sir. There may be a little fraction outside of those sections.
128 11 Q. Can you give a description of the land in those sections?
A. I could not give it very accurately.
Q. What were the words of the grant in the paper Smith executed to you?
A. I could not give the exact granting words.
Q. Give them as near as you can.
A. I should say sold, conveyed, bargained, were some of the words used. I think those three were.
Q. That is your recollection?
A. It would seem so.
Q. Were there any other words in it?
A. I could not say, sure.
Q. Was not the word quitclaim in it?
A. It might have been.
Q. Do you know whether it was or not?
A. I should think it would be, probably. Yes, sir. I have not looked at the copy.
Q. Do you know whether the word quit-claim was in it or not?
A. I should think it was.
Q. Was that paper that L. T. Smith gave you ever in the hands of Judge Crozier?
(Defendants objected as not cross-examination; which objection was, by the court, overruled; to which ruling of the court defendants then excepted.)
A. It was.
Q. When was it in his hands?

(Defendants objected as not cross-examination, and because the time is not confined to the time since the witness had it; which objection was, by the court, overruled; to which ruling of the court defendants then excepted.)

A. It was put in his hands the day it was executed.

Q. State whether it did not remain in his hands till long after the 24th day of May, 1867?

(Defendants objected as immaterial, and not a cross-examination; which objection was, by the court, overruled; to which ruling of the court defendants then excepted.)

A. It did not.

Q. When did you get it from Judge Crozier?

A. I got it from John G. Pratt.

Q. When?

A. I think it was about the 1st of May.

Q. Was there any consideration mentioned in that paper?

A. Yes, sir.

Q. What was it?

A. One of the considerations was that I should pay for the improvements on those lands.

Q. That was mentioned in the deed, was it?

A. Yes, sir.

Q. What other consideration was there, if any?

A. There was a consideration of one dollar, and other valuable considerations.

Q. Are you sure it was in the deed that you should pay for the improvements?

A. Yes, sir; I think so.

Q. Did you pay any dollar?

(Defendants objected as incompetent, irrelevant, and immaterial; which objection was, by the court, sustained; to which ruling of the court plaintiffs then excepted.)

Re-examination:

Question. State if L. T. Smith signed more than one deed that would come anywhere near answering the terms of this paper you looked at?

(Plaintiffs objected as incompetent and irrelevant; which objection was, by the court, sustained; to which ruling of the court defendants then excepted.)

Q. Did L. T. Smith, in your presence, sign any other paper similar to this at any other time?

(Plaintiffs objected as incompetent and irrelevant; which objection was, by the court, sustained; to which ruling of the court the defendants excepted.)

129[12] WILLIAM A. SIMPSON, being duly sworn on this point, testified as follows:

Question. You are one of the defendants in this case?

Answer. Yes, sir.

Q. Look at this paper (showing the copy offered in evidence) and state if you ever saw a paper, in form and language similar to this one, previous to the words of the certificate.

(Plaintiffs objected as incompetent and immaterial; which objection was, by the court, sustained; to which ruling of the court defendants then excepted.)

Q. State if the witness last upon the stand is a brother of yours?

A. He is.
Q. Are you the person he referred to in his testimony as William A. Simpson?
A. I am.
Q. Do you recollect of his giving you the deed he mentioned?
A. I do.
Q. State when it was, as near as you can.
A. It was about the middle of May, 1867.
Q. State what you did with that deed?
A. I enclosed it by mail to Clarke & Co., of this place.
Q. When did you send it from Lawrence?
A. Shortly after the middle of May, 1867.
Q. Have you ever seen that deed since?
A. I never have.
Q. Do you know anything of its whereabouts since that time?
A. I do not.
Q. Have you searched among your papers for it?
A. I have, thoroughly.
Q. Have you been able to find it?
A. I have not.
Q. You looked among all the papers you had?
A. Yes, sir. I made a thorough search.
Q. Did you ever send more than one deed to Clark & Co.?
A. I did not.

M. E. CLARK, being called by defendants, & duly sworn on this point, testified as follows:

Question. State what, if any, firm you are a member of?
Answer. Clark & Co., bankers.
Q. Were you a member of that firm in May, 1867?
A. Yes, sir.
Q. Did you receive a deed from the Missouri River Railroad Company, by L. T. Smith, president, to S. N. Simpson?
A. Yes, sir; I recollect receiving it. I know it was in the spring, about three years ago.
Q. Did you ever receive more than one such deed?
A. No, sir.
Q. What did you do with it?
A. We sent it to the office of register of deeds of this county.
Q. Did you know the handwriting of L. T. Smith?
A. Yes, sir.
Q. Was that deed signed in his handwriting?
A. It is what I remember—that it was signed by him.

Cross-examination:

Q. Do you know who all the parties to the deed were?
A. It was H. M. Simpson, I think. I am not positive.
Q. Was it any one else?
A. I think not.
Q. Who was the grantor?
A. It was L. T. Smith, signed pres't.
Q. Do you know what land it was a deed of?
A. I can't say.
Q. Do you know whether this deed was sent to the office of register of deeds?
A. I suppose it was sent by the boy. All I know is that we sent it to the office, and it was returned marked registered.

Q. Do you know it was registered?
A. All I know is it was so marked on the back.
Q. Do you know where the lands are situated that were described in the paper?
A. I know in the description I refer to was railroad lands from glancing over it through curiosity.
Q. Do you know what you did with the deed after?
A. We mailed it.
130[13] Q. To whom?
A. To Simpson Brothers, Lawrence.
Q. Did you mail it personally?
A. I wrote the letter myself, and have a copy of it.
Q. Did you mail it yourself?
A. No, sir; I never mail letters.
Q. You don't know it was mailed?
A. I don't know that it was ever put in the office.
Q. Did you know the deed was put in an envelope with the letter you wrote?
A. No, sir, I do not. I directed the envelope. The letters are mailed by the boy. He might lose them; I can't say.

Redirect examination:

Q. I understand you to say you directed the letter to Simpson Brothers; where did you leave it as compared with your usual place for leaving letters?
A. It was left on the table.
Q. What is your business?
A. Banker.
Q. What do you usually do with letters?
A. We usually copy them, leave them on the table, and the boy takes them to the office.
Q. Was this left in the usual place?
A. Yes, sir.
Q. Have you ever seen it since?
A. No, sir.
Q. Is that deed in your bank now?
A. No, sir.
Q. Where was it you wrote the letter?
A. In the bank.
Q. Is it among the papers of Clark & Co.?
A. No, sir.
Q. Have you looked for it?
A. We did look for it.
Q. You say you could not say what Simpson it was to?
A. No, sir.
Q. How did the signature to the deed compare with the form of the signature on this paper? (Showing the copy.)
A. My impression is it was L. T. Smith, pres't.
Q. Did you get more than one deed from Simpson Brothers to have recorded?
A. No, sir.

H. C. KELLER, being called by def'ts, and duly sworn on this point, testified as follows:

Q. Who was register of deeds of this county, in May, 1867?
A. I was.

Q. Do you know what book this is?
A. It is record 16, of conveyances, of the office of register of deeds of this county.
Q. State whether it was in that office in May, 1867?
A. It was.
Q. What use was it being put to at that time?
A. For recording conveyances.
Q. Look at this record, on page 109 and page 110, to the word H. C. Keller, where it first occurs on that page, and state in whose handwriting it is.
A. It is in the handwriting of my brother.
Q. Were those deeds compared?
A. Yes, sir.
Q. Who helped compare them?
A. I did.
Q. In what capacity was he acting at that time?
A. He was my clerk.
Q. Do you recollect this deed?
A. No more than any other deed. I know it was recorded; that is all.
Q. Was there any other deed from the Missouri River Railroad Company to S. N. Simpson, recorded in the month of May, 1867?
A. I don't know. I can't tell, positively, from the index. It may be recorded in some other book.

Cross-examination:

Question. You don't recollect that deed more than any other?
Answer. I do not.
Q. Do you recollect that you compared that deed, any more than it was your habit to compare deeds?
A. I have no recollection of this particular deed.
Q. Do you know whether it had any seal to it?
A. Yes, sir; I remember that.
131[14] Q. Do you remember it aside from the record?
A. That is the only way. We never put on a seal unless there was one on the deed.

WILLIAM A. SIMPSON, being recalled, testified as follows:

Question. Who compose the firm of Simpson Brothers?
Answer. H. M. Simpson and myself.
Q. Did you ever receive such a letter as Mr. Clark mentioned?
A. Not to my knowledge.
Q. Did you ever receive the deed?
A. No, sir.
Q. Are you acquainted with all the other defendants in this case?
A. I can't say that I am personally acquainted with all of them. I am with most of them.
Q. What position do they occupy with reference to this land?
A. They are my tenants.
Q. Did you ever give them any title-papers?
A. No, sir.
Q. Do they live on the land?
A. They have at different times.

H. M. SIMPSON, being recalled, testified as follows:

Question. Are you the H. M. Simpson who is a member of the firm of Simpson Brothers?

Answer. Yes, sir.

Q. Did you ever receive such a letter as was mentioned by Mr. Clark?

A. Not that I know of.

Q. Do you know anything about the deed mentioned by the witnesses?

A. I don't know where it is.

Q. Have you ever seen it since May, 1867?

A. No, sir. I saw it in May, 1867, but not since.

Q. Do you know where it is now?

A. No, sir.

Q. Did you see it before or after it was recorded?

A. Before.

Q. Have you searched among the papers of Simpson Brothers for it?

A. Yes, sir.

Q. Searched your correspondence?

A. Yes, sir.

Q. Have you looked through your other papers for it?

A. Yes, sir; I think so. I intended to be thorough.

Q. Have you known where it was since May, 1867?

A. No, sir.

H. C. KELLER, being recalled, testified as follows:

Q. State when this record was made?

A. It was filed for record May 24th, 1867, at 10 o'clock a. m.

Defendants then offered in evidence the certified copy of the record of the last-mentioned deed, & of the certificate thereto before referred to, a copy which is as follows, to wit:

Know all men by these presents that the Missouri River Railroad Company, in consideration of one dollar, and other valuable considerations to it paid by Samuel N. Simpson, of Lawrence, Kansas, the receipt whereof is hereby acknowledged, do hereby convey, remise, release, and forever quitclaim to the said Samuel N. Simpson, his heirs and assigns forever, all the right, title, and interest acquired by the Missouri River Railroad Company, under treaty of July 4, 1866, or by Len. T. Smith, as its president, or that they may hereafter acquire, under or by virtue of said treaty, of the following-described lands, to wit:

The fractional part of section thirty-four, town. twelve, range twenty, lying north of the Kansas River; the south fractional half of section twenty-seven, town. twelve, range twenty, and the northeast fractional quarter, and east one-half of northwest quarter of section twenty-seven, town. twelve, range twenty; the east half of southeast quarter of section twenty-two, town. twelve, range twenty; the west fractional half of the northwest quarter of section twenty-six, town. twelve, range twenty, and the south half of the northeast quarter of the northwest quarter, and the southeast fractional part of the east half of the northwest quarter of section twenty-six, town. twelve, range twenty, containing in all six hundred and forty-four twenty-two hundredths acres, ($644\frac{22}{100}$,) being of the lands of the Delaware Diminished Reserve, in Leavenworth County. It being understood that if there are any improvements on the above-described lands to be paid for under the treaty before mentioned, the said Simpson shall pay for the same. And reference is also hereby made to an agreement of the parties of this date, which qualifiedly controls this deed, and all estate, title, and interest of the said Missouri River Railroad Company, either in law or in equity,

132 15

of, in and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof: To have and to hold the same to the only proper use of the said Samuel N. Simpson, his heirs and assigns forever.

In witness whereof the said Missouri River Railroad Company, by its president, Len. T. Smith, has hereunto set its hand and seal this twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-seven.

The interlineations made between the tenth and eleventh lines before signing.

[L. S.] MISSOURI RIVER RAILROAD COMPANY,
[OFFICIAL SEAL.] By L. T. SMITH, *President.*

[$5.00 revenue stamps affixed.]

STATE OF KANSAS,
Leavenworth County, ss:

Be it remembered that on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-seven, before me, a notary public in and for the county of Leavenworth, personally came Len. T. Smith, president, the party named in the foregoing deed, and acknowledged the signing and sealing thereof, to be his voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year aforesaid.

[NOTARIAL SEAL.] L. W. ROYS, *Notary Public.*

Recorded May 24, 1867, at 10 o'clock a. m.
H. C. KELLER, *Register of Deeds.*

STATE OF KANSAS,
Office of the Register of Deeds, Leavenworth County, ss:

I, C. C. MAST, register of deeds, in and for the county and State aforesaid, do hereby certify that the above and foregoing is a true, full, and correct copy of a certain deed executed by the Missouri River Railroad Company, by L. T. Smith, president, to Samuel N. Simpson, and of the certificate of acknowledgement thereof, and also of the date of record of the same, as fully as the same appears of record in my office, in Book "16," on pages 109 and 110.

Witness my hand and seal of office, at Leavenworth, this 3d day of May, A. D. 1870.

[L. S.] C. C. MAST, *Register of Deeds.*

[U. S. stamp.]

(Plaintiffs objected as incompetent, irrelevant, and because sufficient preliminary proof has not been introduced to make a copy admissible; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted, and said def'ts then read said certified copy of said record of said deed in evidence.)

Said defendants then offered the original record of the deed on pages 109 and 110 of record 16 of conveyances of the office of register of deeds, Leavenworth County.

(Plaintiffs objected as incompetent, and because a copy thereof had already been read in evidence, & they then withdrew the exception last above shown; which objection was by the court sustained on the ground that the copy was sufficient.)

Defendants then offered in evidence a deed from Samuel N. Simpson to William A. Simpson, dated May 28th, 1867, acknowledged May 30th, 1867, and recorded May 31st, 1867; of which deed and of the certificate thereto the following is a copy, to wit:

133[16] This indenture, made this twenty-eighth day of May, in the year of our Lord one thousand eight hundred and sixty-seven, between S. Newell Simpson and his wife, Kate L. Simpson, of city of Lawrence, in the county of Douglas, and State of Kansas, of the first part, and William A. Simpson, of city of Lawrence, in the county of Douglas, and State of Kansas, of the second part, witnesseth: That the said parties of the first part, in consideration of the sum of one dollar, and of other valuable consideration, to them duly paid, have sold, and by these presents do grant and convey to the said party of the second part, his heirs and assigns, all those tracts or parcels of land, situated in Leavenworth County and State of Kansas, and described as follows, to wit: The fractional part of section thirty-four, town. twelve, range twenty, lying north of Kansas River; and the south fractional half of section twenty-seven, town. twelve, range twenty; and the northeast fractional quarter of east half of the northwest quarter of section twenty-seven, township twelve, range twenty; and the east half of the southeast quarter of section twenty-two, township twelve, range twenty; and the west fractional half of the northwest quartar of section twenty-six, town. twelve, range twenty; and the south half of the northeast quarter of the northwest quarter, and the south fractional part of the east half of the northwest quarter of section twenty-six, town. twelve, range twenty, containing six hundred forty-four and $\frac{22}{100}$ acres in the aggregate, and being the same real estate conveyed to me by the Missouri River Railroad Company by deed, bearing date February 21st, A. D. 1867, with the appurtenances, and all the estate, title, and interest of the said party of the first part therein. And the said S. Newell Simpson does hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein, free and clear of all encumbrances, and that he will warrant and defend the same in the quiet and peaceable possession of said party of the second part, his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year above written.

SAMUEL N. SIMPSON. [SEAL.]

Sealed and delivered in presence of—
T. A. GORRILL.

[U. S. stamp, $6.00.]

STATE OF KANSAS, *County of Douglas, ss:*

On this thirtieth day of May, A. D. 1867, before me, a notary public in and for said county came Samuel N. Simpson, to me personally known to be the identical person described in, and whose name is affixed to, the above conveyance as grantor, and acknowledged the same to be his own voluntary act and deed.

In testimony whereof I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

[SEAL.] T. A. GORRILL, *Notary Public.*

STATE OF KANSAS, *Leavenworth County, ss:*

This indenture was filed for record on the 31st day of May, A. D. 1867, at 10¼ o'clock a. m., & duly recorded in book 15 of conveyances, at pages 203 & 204.

H. C. KELLER, *Register of Deeds.*

(Plaintiffs objected because no title had been shown in the grantor; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted, & said def'ts then read said certificates & deed in evidence.)

W'M A. SIMPSON, being recalled, testified as follows:

Q. Look at this paper (showing the last paper offered in evidence) and state what actual consideration, if any, you gave for the property described in that deed.

(Plaintiffs objected as immaterial; which objection was by the court overruled: to which ruling of the court plaintiffs then excepted.)

A. I paid him $6,000.

134[17] Q. What in?

A. It was $2,300 or $2,400 he was owing me at the time, which I cancelled, and the balance was in cash, paid partly at the time, and all of it within a few months.

Q. Did you pay any of that money at the time the deed was made?

A. Yes, sir.

Q. How much did you pay at that time?

A. I credited him with what he owed me—between $2,300 and $2,500—and gave him an obligation for the rest as he wanted it.

Q. What has become of that obligation?

A. I think it was simply a bank receipt against which he checked money out of the bank.

Q. When did he get the money out of the bank?

A. Perhaps within the next three or four months.

Q. Had you seen this paper (showing the paper called a contract) before you made the purchase?

A. I had.

Q. Had you read it?

A. I had.

Q. Would you have made the purchase shown by this deed if it had not been for this paper? (referring to said paper called a contract.)

(Plaintiffs objected as incompetent and irrelevant; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. I should not.

Q. Was that paper (referring to said contract) you hold in your hand before you at the time this deed was made?

A. I think I compared the description of the land in this contract with the description in the deed from my brother to myself.

Q. I understand you released him from the debt he owed you?

A. Yes, sir.

Q. The balance was paid in money?

A. Yes, sir.

Q. Was it all drawn out before the 1st of October, 1867?

A. I think it was.

Cross-examination:

Q. Did you state that you sent the deed of the Missouri River Railroad Company to Clark & Co. for record?

A. Yes, sir.
Q. Did you own the property at that time?
A. No, sir.
Q. Who did you send it for?
A. My brother.
Q. Had you been in treaty for the property?
A. I can't say whether I had been at that time or not.
Q. When did the treaty commence between you and your brother for the property?
A. I can't tell the date.
Q. How long before the sale?
A. But a short time.
Q. Who drew the deed to you?
A. My brother, H. M. Simpson.
Q. Did he know the consideration?
A. I can't say certainly; I think likely he did.
Q. Why was it not put in the deed?
A. I can't say.
Q. Was he present when you contracted with your brother?
A. I can't say certainly; I think not.
Q. Where was the contract made?
A. In Lawrence.
Q. Whereabouts in Lawrence?
A. I can't say certainly whether in my brother's house or in the bank. Possibly part of it in each place.
Q. Who was present at the time the trade was made?
A. I can't say positively. I can't say that any one was present.
Q. How long were you trading?
A. I don't recollect certain how long.
Q. Did you not know that your brother and Len. Smith had had a difficulty about the land at the time you took the deed?
A. I did not.
Q. Did you not know that your brother and Len. Smith had been in a fight over here?
A. I don't know whether that fight was before or after that.
Q. Did you know they had been in a fight?
A. I have heard of it.
Q, Did you hear of it soon after it occurred?
A. I did.
Q. Did you hear what it was about?
A. I heard it was about business between those two.
135[13] Q. What business?
A. Business in connection with the railroad company.
Q. What particular business?
A. I never knew the particular business they had had. According to the account I had of it, it was something that came up on the spur of the moment.
Q. What was the account you had of it?
A. It was an account of the scrimmage, as it occurred.
Q. Who did you have it from?
A. My brother, S. N.
Q. What did he say to you as to what was the particular thing that came up that the scrimmage was about?
A. He said they got into a dispute about some of their business.
Q. What business?
A. I don't know as he told me—I don't remember.

Q. Was it about that land?
A. I don't know.
Q. What other business had they?
A. I don't know.
Q. Do you say you don't know what the scrimmage was about?
A. I don't know in full.
Q. As far as you do know, tell the court.
A. As far as I know, it was a dispute in regard to some transactions between my brother and Mr. Smith, in which the lie passed between them, or its equivalent, and the squabble resulted soon after that.
Q. What was that lie about?
A. I don't remember what it was about.
Q. Did you know at the time?
A. I may have known, and I may not. I presume he might have told me.
Q. You think he did, don't you?
A. I think he did.
Q. Did you inquire about it?
A. He gave me quite a detailed account of it. I don't know that I inquired particularly.
Q. He gave you a detailed account of what the lie was about?
A. No, sir; of the melee or squabble.
Q. Where does your brother, S. N. Simpson, live?
A. In Lawrence, when at home.
Q. Where does he keep his office?
A. In Simpson Brothers' bank, mostly.
Q. State whether your relations with him at that time were not, and have since been, very intimate?
A. They have not been the opposite of that.
Q. Are you in the habit of taking conveyances of property he gets one way and another?
A No, sir.
Q. Have you not taken conveyances of railroad property generally, that he has gotten from the Kansas Pacific Railroad Company, as well as this?
(Defendants objected as incompetent and irrelevant, and not primary evidence; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.
The last question was again repeated, the plaintiff stating it was asked for the purpose of effecting the credibility of the witness.
Defendants objected as incompetent and irrelevant; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)
Q. Did you ever give your brother credit for any other real estate?
(Defendants objected as incompetent and irrelevant, and because the time is not sufficiently limited; which objection was by the court sustained, the court stating that if the plaintiffs confined the question to about the time of this deed to witness, it may be asked; to which ruling of the court plaintiffs then excepted.)
Q. What did he owe you for?
A. For money.
Q. Anything else?
A. I don't know of anything else at the time; there might have been.
Q. Did he owe it to you, or Simpson Brothers?
A. He owed it to me, individually. It was money in the first

136[19] place owing to Simpson Brothers. I assumed it as a member of the firm, and charged it to myself, which made it between him and me.

Q. Did you have a conversation with your brother, H. M., about it?

A. I don't know. I presume I did.

Q. Did he know you were going to assume it?

A. I don't know whether I gave him notice beforehand or not.

Q. You are a member of the firm of Simpson Brothers?

A. Yes, sir.

Q. Bankers?

A. Yes, sir.

Q. How did the debt of about $2,500 originate; how did it get on Simpson Brothers' book; when and for what consideration?

(Defendants objected as incompetent; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. For cash paid to my brother.

Q. When?

A. During a few months previous.

Q. Did you tell your brother what the consideration of the deed was?

A. I don't remember that I did.

Q. You say that you don't remember whether you told your brother you were going to assume the debt to the firm, or that you told him what the consideration was?

A. I don't know positively, before I made the trade. He knew it, however.

Q. Do you know your brother, who drew the deed, knew what the trade was?

A. I can't say positively he knew the whole transaction.

Q. Did he know you were going to assume the debt?

A. I don't know that he did before I made the trade.

Q. Do you know you told him what the consideration was to be?

A. I don't know that I did.

Q. Is your brother, S. N., insolvent, so that no debt can be made off him?

A. I can't say.

Q. Has he any property in his own name; is he in the habit of keeping property in his own name?

A. I think he had some in his own name at that time.

Q. Had he any property that he claimed in his name that was subject to execution?

(Defendants objected, because it calls for a conclusion as to real estate, which is shown in writing; which objection was by the court overruled; to which ruling of the court defendants then objected.)

A. Yes, sir; in Douglas County.

Q. Where?

A. I think in Lawrence.

Q. Was it a homestead, or outside property?

A. Outside property.

Q. What property was it?

A. There was a piece of property immediately south of the town-site of Lawrence.

Q. State whether you did not take this property for the purpose of avoiding his creditors.

A. I did not.

Q. Do you know whether he was pressed with debts at that time?

A. I don't know that he was.
Q. What had he done with the $2,500 you had advanced him?
A. I can't say.
Q. What did he do with the money you paid him after?
A. I can't say.
Q. Have you a paper or memorandum showing when you paid the balance of that money?
A. I have no memorandum.
Q. Did you know that it would be important to prove that when you came over here?
(Defendants objected as incompetent; which objection was by the court overruled; to which ruling of the court defendants then excepted.)
A. I did not.
Q. Do you know how long your brother had possession of this land before you made this trade?
A. He had had it between two and three months.
137[20] Q. Are you sure of that?
A. Yes, sir; I think so. I can't say certain how long he had been in possession, but the date of his deed and the date of my deed was two or three months apart.
Q. Is it not a fact that you took a conveyance within two or three days after you first saw the deed in his hands?
A. I don't think it was as soon as that.
Q. How soon was it?
A. I think in two or three weeks.
Q. Do you know of S. N. Simpson and L. T. Smith having any controversy with anything else except these lands?
A. I think the trouble they had grew out of that.
Q. That was your understanding at the time?
A. Out of their business together.
Q. Do you know of their having any controversy except about these lands?
A. Yes, sir.
Q. What was it?
A. About some papers between them.
Q. What papers?
A. I can't say.
Q. Do you know of their having any other papers but these?
A. I know of Smith having other papers but those about which the trouble arose.
Q. What were they?
A. I can't say. They were connected with their business.
Q. How do you know?
A. The same as I know they had these.
Q. What papers were they?
A. I don't know.
Q. How do you know they had papers?
A. I don't know they had trouble; I did not see it.
Q. Did not your brother tell you they had trouble, and it was about the lie passing?
A. Yes, sir.
Q. Did you not know at the time you took that deed there was no patent from the United States for those lands?
A. I think I knew the patent had not issued.
Q. Did you not know it had not been?
A. I did not know it had not been, positively.

Q. Did you make inquiries as to whether it had or not?
A. I presume I did, in connection with the trade.
Q. Don't you know your brother went over to Mr. Pratt's at the time the Indians were to be assembled, to make a registration?
A. I can't say I know he went there.
Q. Don't you know he left home to go there?
A. No, sir; he came to Leavenworth.
Q. What did he come to Leavenworth about?
A. I don't know.
Q. Did he not tell you what he came for when he went back home?
A. I don't know that he did.
Q. Did he not tell you he came to get a deed, the time that deed was purported to have been made by Mr. Caldwell?
A. He did not.
Q. Did he not tell you that the papers were with Judge Crozier or Mr. Pratt?
A. I think he did.
Q. Did he tell you he had been to Mr. Pratt's?
A. He did.
Q. Did he not tell you he had stopped the registration—stopped till there was a settlement?
A. He did not.
Q. Don't you know he went for that purpose?
A. No, sir.
Q. Don't you know that before that time he said he would stop the action of the Indians till they settled with him?
A. No, sir.
Q. He did not tell you he had stopped it a whole day till they did settle?
A. No, sir.
Q. Did he tell you how long he stayed at Maj. Pratt's?
A. I don't know whether he did or not.
Q. What did you understand about if he did not get certain lands he was to have certain others?
(Defendants objected as immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)
138[21] A. I understood myself that the only understanding was the conveyance mentioned in the agreement; if the title failed, he was to have other lands.
Q. Did you understand that the company had not got a patent, and there was a possibility of there not getting it?
A. I did not know of any reason why they would not get a patent.
Q. Did you understand, from any source, that they had not got a patent, and that there was a possibility that they might not get it for these particular lands you proposed to buy?
A. I had no reason to suppose there was any unusual probability of their not getting it any more than any other transaction with the Government.
Q. Did you understand they had not got a patent for these particular lands, and it was possible they might not get it?
A. I did not understand they had got a patent at that time. I did not understand there was any unusual probability of their not getting a patent.
Q. Will answer, Yes or no?
A. I will answer it any way to accommodate you, so it conforms to the facts.

Q. Did you understand they had not got a patent for the land you took a deed for, and it was possible they might not get it?

A. I did not understand there was any possibility by which they *they* would fail to get a patent.

Q. Then you did understand they did not have a patent?

A. I did, that they did not have it at that time.

Q. Did you make inquiries of any one having any know'edge in reference to the matter, whether they had got a patent or not?

A. I don't remember having inquired of any one, unless, perhaps, both my brothers.

Q. Did you take their judgment on this question?

A. I took so much of it as I thought fit.

Q. Did you take their judgment on this question?

A. No, sir; I took my own.

Q. What did you do?

A. I made the purchase, and took a deed.

Q. What inquiries did you make?

A. Whether the patent was issued?

Q. Who did you inquire of about it?

A. S. N. Simpson, I think.

Q. What did he tell you?

A. My recollection is, he said it was not issued yet.

Q. When did he tell you that?

A. While we were negotiating this trade.

Q. Did he tell you whether he thought he could get the Indians to agree to go off it?

A. He did not.

Q. What Indians have lived on those lands?

A. The Delaware Indians.

Q. What Delaware Indians?

A. I don't know the names positively. I think one was named Beaver.

Q. How far are those lands from Lawrence, where you live?

A. Between three and four miles, the way the road runs.

Q. What road is it on?

A. I don't know that it has any name.

Q. Was it not on the Leavenworth and Lawrence road?

(Defendants objected as irrelevant and not cross examination; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. It is not.

Q. Had you not been accustomed to go along that road frequently, right by that land?

A. Not very often.

Q. Describe where that land is.

A. It is bounded on the south by the Kansas River, and the body of it all lies in the river bottom. One 80 lies on higher ground. It all lies east of the Leavenworth and Lawrence road.

Q. Is there not a clump of houses on that 80 acres?

A. I think there are one or two, but I don't think any of those that are nearest together are on it.

Q. Was that place called the Sarcoxie place?

A. The one where the largest number of houses is, I think is.

139[22] Q. Was it where Sarcoxie lived?

A. I don't think it included the place where he lived.

Q. What Indians had lived in those houses?

A. I am not familiar with their names.

Question by the court:

Question. Was it part of what is known as the Sarcoxie tract of land?

(Defendants objected to the court asking any question, as incompetent; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I think so.

Cross-examination resumed:

Q. Were there any Indians living on it when you got it?

A. I don't know.

Q. Did you go to see if there was any one on it?

A. I did not.

Q. Did you go to make inquiries or observations to see if any persons were in possession of the property at the time you bought it?

(Defendants objected, as incompetent, irrelevant, and not cross-examination; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I did not.

Q. You read the deed and other papers before you bought, did you not?

A. Yes, sir.

Q. Suppose it had turned out, you having taken a warrantee deed to certain land, that the railroad company did not get a title to those lands as expressed in that deed, what provision did you make to get your money back that you had paid for it?

A. The terms of the deed, which was a warranty.

Q. You made no provision except what the deed showed?

A. I did not.

Q. When did you pay the $2,500?

A. I have already stated it was a balance due me at the time for money he had been getting along some few months previous.

Q. When did you adjust it?

A. I don't remember the date.

Q. Can you remember the date with reference to the date of the deed?

A. Not positively.

Q. Do you remember whether before or after?

A. I think it was after.

Q. You don't remember when?

A. No, sir.

Q. Did you take any evidence of the payment of the $2,500?

A. No, sir; not that I recollect, at the time.

Q. Did you take any evidence or memorandum of payments of any other money to your brother, with reference to this property?

A. Not at the time the deed was passed.

Q. Did you at any time?

A. The money that I paid I paid him at different times on account, and I think we settled some time after.

Q. Do you know when?

A. I can't say when.

Q. Was it paid in checks?

A. I think it was, mostly.

Q. You don't know how long after you adjusted it?

A. I don't know how long after the account was settled between us.

Q. Were they common, ordinary bank-checks he drew it on?

A. I think they were, generally.

Q. Who were the checks on?

(Defendants objected, as incompetent. The checks would show for themselves, if produced. Which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Q. Whose money did you pay?

A. My own money.

Q. Where did you get it from?

A. I can't tell any one place.

Q. Did you have separate funds in the bank?

A. Sometimes I had; sometimes I had not.

140[23] Q. Were the checks drawn on the bank?

(Defendants objected, as incompetent. The checks will show for themselves, if produced. Which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. They were.

Q. Were those checks paid as other checks, over the counter?

A. Not always.

Q. Were any of them?

A. Yes, sir.

Q. Do you remember any that were not?

A. I can't say what ones. I know some of them I paid behind the counter. I paid them myself.

Q. Was it paid out as other money was paid out of the bank, on checks?

A. I don't know of any difference in the mode of paying it out.

Q. Who was the money charged to when paid out?

A. It was charged to his account.

Q. In whose favor?

(Defendants objected, as incompetent, and because the books will show for themselves, if produced; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. He had a bank-account there.

Q. It was with Simpson Brothers, was it?

A. Yes, sir.

Q. Does he continue to draw checks on Simpson Brothers, and has he all the time since? Has he not a running account with Simpson Brothers?

A. He has.

Q. If I understand you, you stated, in answer to a question by Mr. Wheat, that you bought the land solely on the statement of Mr. Caldwell you had in your hands. Did you so state?

A. I don't think it was worded exactly like that.

Q. What reason had you to suppose it was not the deed of the company, without Caldwell's statement?

A. I don't know as I had any special reason.

Q. Then why do you rely on that statement?

A. Because it was a paper made after the deed was made, which was evidence to me that the deed was not only made, but was delivered satisfactorily to Mr. Caldwell.

Q. Did you read the deed?

A. I did.

Q. And read the paper?

A. I did.

Q. Did you read the deed Smith made on the day you got your deed from your brother?

A. I can't say whether I did on that day or not.

Q. Did you the day before?

A. I can't say I did the day before.

Q. How long before did you read it?

A. I think within a week or ten days, and I don't know but longer. I don't remember.

Q. Did you remember the contents of the deed?

A. Yes, sir; all the important parts of it.

Q. You say the paper you relied upon showed the deed had been made anterior to the date of that paper?

A. The paper recited that the deed had been made.

Q. You relied upon the paper because it was after the deed?

A. It showed on the face of it that the agreement was made after the deed was made.

Q. Did you know that the deed contained the expression, reference is hereby made to the agreement of this date, which qualifiedly controls the deed?

A. I did.

Q. Yet you supposed the written instrument was made after the deed?

A. It said there had been a deed made.

Q. And because it said so, you put your reliance on it?

A. I certainly did not gainsay what the contents of the agreement stated.

Q. With the knowledge that this deed contained this statement, what agreement did you suppose was mentioned in the deed?

A. I supposed it referred to the paper we have been talking about here.

Q. And yet you supposed the deed was made before the agreement, and not concurrent with it?

141[24] A. The agreement said the deed had been made. I did not indicate that I thought it had been made a week before, or two days before, but it did recite the making of the deed.

Q. You did not suppose them to be concurrent acts?

A. I did not know whether they were executed the same time or not, only by the agreement; that said the deed had been made.

Q. You did not know whether the statement in the deed was true or not, that the agreement had been made; you did not rely on that statement?

A. I paid no special attention to the reading of that.

Q. With those papers in your mind and before you, you had such doubts about the propriety of the agreement you were going to make, that you would not have made it without the paper signed by Mr. Caldwell?

A. I would not have made the bargain and paid the same price for the land without that agreement.

Q. What difference would you have made?

A. I don't know. I had the agreement, and so I did not figure up what I would have given for it without it.

Q. Would you have bought it at all but for that paper?

A. I can't say what I would have done without that paper. I can't say positively whether I would or not.

Q. Then you did not buy it solely on that account?

A. I have not said I bought it solely on that account—not exactly. I said that I would not have made the purchase and paid that price for it but for that.

Q. Have you any papers or evidence of any payment of that $6,000, other than the bank account and checks?

A. I don't know that I now have.
Q. Do you recollect when the Delewares left the country?
A. I think they left in the spring of 1868, as a tribe.
Q. You said Beaver's family lived on that land?
A. Not certainly. I said I thought they did.
Q. Do you know they lived there up to the time of the Delawares leaving?
A. I don't know positively they lived there at all.
Q. Whoever did live there, did they continue to remain there till the removal of the tribe?
A. I can't say.
Q. Did you ever examine that land?
A. Somewhat.
Q. When?
A. In the spring of 1867.
Q. Before or after you got your deed?
A. I think it was some time before.
Q. In 1867?
A. Yes, sir.
Q. What time in 1867?
A. I judge in the early part of May, or possibly the last of April.
Q. What examination did you make?
A. I went over part of it.
Q. Who was with you?
A. My brother, S. N. Simpson.
Q. Was that before or after you bought it?
A. I can't say whether before or after I had made the agreement to buy it. I think it was a short time before.
Q. How long after you agreed verbally to take it, till the trade was consummated?
A. I can't say.
Q. Where was it made?
A. I can't say; either at his house or the bank.
Q. Was not that a scheme gotten up between you and him to get it out of Shoemaker's hands?
A. It was not, in any sense whatever.
Q. Did you go to examine that land with a view to determine its location before you bought it?
A. Partly the location, and partly to see what kind of land it was.
Q. What corners did you go to?
A. I can't say I went exactly to any corner.
Q. How long were you gone from Lawrence?
A. I don't remember.
Q. Did you go enough over it to determine what the land was worth?
A. Not accurately.
Q. Explain how much you did go over it—what was your course from the time you went on the land till you came off, and where you were.
142[25] A. I went on the land across the west line, about at the northwest corner of the main body of it. There is one 80 that was up north of the main body of it. I went to the northeast corner, and crossed Mud Creek bridge on the railroad. I left my horse just back of that. I then went a little further east, and then bore south or southeast, and went down to where I could see the river, but did not go clear to the river bank, and then took a west course, or perhaps a northwest course, back to where my horse was hitched.

Q. How much distance did you travel?
A. I could not tell you.
Q. About how much?
A. I think altogether I must have traveled two and a half or three, possibly three and a half or four miles. I judge it was between two and four miles.
Q. Was that before or after you got the deed?
A. It was before the deed was delivered.
Q. Was it before you contracted for it?
A. It was before I had agreed positively to take it.
Q. You are not certain whether you went to see the land before you contracted to take it or not?
A. I am not very positive, but I think it was before I made a verbal contract to take it. I can't say.
Q. Do you know you were there?
A. I do.
Q. Was there any one living on the land at that time?
A. I think there was.
Q. Who was it?
A. I don't know who they were.
Q. Did you go to make inquiries whether they were Indians or white persons?
A. I did not.
Q. Were you in sight of their habitations?
A. I was.
Q. You did not go to see who they were or by what right they were there?
A. I did not.
Q. Was any one cutting timber on the land at that time?
A. I did not see any one.
Q. Did you see ties or other timber cut there?
A. I think I saw some ties that the Union Pacific road had been cutting off it.
Q. How do you know that?
A. I did not see them cut them. I was informed they were cut for them, by their order.
Q. Do you know they were cut by Shoemaker, Miller & Co.?
A. No, sir.
Q. Did you not hear they were cut by them?
A. I did not.
Q. Where were they used?
A. Some of them were transferred across the river, and were used on the Galveston road.
Q. Those you supposed the Kansas Pacific road had cut?
A. I was told so.
Q. Who by?
A. By one of their choppers. I don't remember his name now. He was up a few days before, and said he was on the edge of it, cutting.
Q. Don't you know that Shoemaker, Miller & Co. had been cutting timber off that section and all along there for the construction of the road?
A. I don't know that they had been cutting generally on it.
Q. Had they been cutting specially?
A. All the means I had of knowing is by the men who had been chopping there. They said they had got over the line and had cut some ties off of that piece.

Q. Did you know the firm of Shoemaker, Miller & Co.?
A. I knew Mr. Shoemaker.
Q, Did you have transactions with the firm?
A. I think I did.
Q. What were they engaged in?
A. Either Shoemaker, Miller & Co. or R. M. Shoemaker & Co. were engaged in building the railroad.
Q. What business were Shoemaker, Miller & Co. engaged in?
(Defendants objected as incompetent and not cross-examination; which objection was by the court overruled; to which ruling of the court defendants then excepted.)
A. Either Shoemaker, Miller & Co. or R. M. Shoemaker & Co. were building the Kansas Pacific Railroad.
143[26] Q. Do you mean to say that both were not?
A. I don't mean to say what the difference in those two partnerships was.
Q. Do you know what business Shoemaker, Miller & Co. were engaged in in Kansas?
A. I think they were the parties who were constructing the railroad.
Q. Do you know whether they were or not?
A. I could not say of my own personal knowledge that that was the style of the firm building it.
Q. Do you know of your brother, S. N. Simpson, and L. T. Smith having any other business or transactions about February, 1867, than this matter about these lands?
A. Yes, sir.
Q. What was it?
A. It was in connection with timber that was being cut on the Diminished Delaware Reserve lands, as I understand it, by contractors of the Kansas Pacific Railroad Company. Mr. Smith was over to Lawrence two or three times, or perhaps more, in consultation with my brother, S. N., in regard to putting a stop to the cutting of timber.
Q. What time was that?
A. I think it was during the summer of 1867.
Q. Before or after you purchased?
A. I think it was after. It was not far from that time.
Q. Do you know whether that was the time the injunction was obtained to restrain the cutting of timber?
(Defendants objected as incompetent, and because the papers will show if produced; which objection was by the court overruled; to which ruling of the court defendants then excepted.)
A. I do not.
Q. You know of no transactions between your brother, S. N., and Smith, before that time?
A. They had business before, I think.
Q. What was it?
A. It was in connection with the Diminished Reserve lands. The precise nature of it I can't say.
Q. That was after you got your deed?
A. I think after and before both.
Q. Do you know whether it was getting your brother to help consummate a trade with Shoemaker, Miller & Co. about the land?
A. I was not aware of anything of the kind. The business I speak of was in connection with timber. He was getting my brother to assist him in preventing the cutting of timber off the land.
Q. Were there any papers between them about it?

A. I can't say whether there were or not.

Q. Did they have any differences about that matter of cutting timber?

A. I don't know of any.

Q. You never heard of any?

A. I never heard of any. They appeared to be friendly.

Q. You never heard of their having any differences about that affair?

A. Not about that.

Q. Is that the only other transaction you know of their having, except the deed matter?

A. I don't know they never did have any. I don't know of any other positively.

Q. Were these sums your brother drew out of the bank from time to time large or small sums?

A. That would be according to what you would call a large or small sum. I presume that he drew from $10 to perhaps $500 or $1,000 at a time.

Q. What is your recollection about his getting it in small sums—under $100. Do you remember of his drawing over $100 at a time?

A. I don't remember any particular sum he drew.

Q. Did he draw any checks in favor of any other person?

A. I presume he did.

Q. Do you remember whether he did or not?

A. I should think he did, some part of it

Q. Do you say that from your general idea of business, or your recollection of the circumstance?

A. I don't remember any special circumstance that would make me think that way.

144[27] Q. Then you do not know whether you did or not; and you don't know how large a sum he drew?

A. Not positively.

Q. Nor how long he was drawing it?

A. I think he drew it out by September or October, 1867, at least. I don't remember positively.

Q. Did he have any deposits in the mean time?

A. Yes, sir.

Q. He deposited his money in bank?

A. Yes, sir; he was depositing and drawing all along, more or less.

Q. When did you last look at the books in reference to his account?

A. I can't say positively. I may have looked within a month, as to his present account; but as to the account of the transaction at that time, I can't say when I did look at it.

Q. Did you place at any time to the credit of your brother, on account of that transaction, $6,000, or any sum of money on the books of the firm?

A. In the settlement between himself and myself, that was reckoned as a credit along with commissions for selling real estate, and the balance on the outside account was placed to his credit. I can't say how much.

Q. Was it a credit on the books of Simpson Brothers, or a credit against you? In what books was it put?

A. In the books of the bank.

Q. When was it?

A. I can't say when the settlement occurred with him.

Q. Was his account ever drawn or not?

A. It was.

Q. On what account was it ever drawn?

A. On account of money due him on our outside business—lands on commission.

Q. Did you put to his credit on the books of Simpson Brothers the balance coming to him that you promised to pay him for that land?

A. Not that particular amount by itself alone, but that together with other outside accounts of commissions on real estate transactions. They were all put together.

Q. When were they put in the book?

A. I can't say when. It was some time after.

Q. Do your bank-books contain any evidence of a payment which was not a payment of the balance of that $6,000 at any time?

(Defendants objected as incompetent, and because the books will show if produced; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Redirect examination:

Q. Tell, as near as you can, when you now think that fight occurred between your brother and L. T. Smith?

A. I have been thinking it over since I was asked the question before, and I am strongly of the impression that it was in the fall of 1867, or in the early part of the winter of 1868. I could not say positively. I know it was cold weather.

Q. State whether, in the summer of 1867, Mr. Smith was ever in Lawrence after the deed was made to you?

A. I think it was in the summer of 1867.

Q. They appeared to be friendly at that time?

A. They did.

Q. To the last question by the counsel for plaintiffs I did not understand whether you meant to say the items of the account are charged on the books or not. What I want to know is, whether you meant to say any $6,000 item was on the books at any time?

A. I did not say so.

Recross-examination:

Q. Do you think that celebrated fight that Smith and your brother had, you did not hear of till a year after, and it was cold weather when you did hear of it?

(Defendants objected as incompetent and not a cross-examination; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

(No answer.)

Q. Is your recollection now that it was in the fall of 1867?

A. I think it was in the fall of 1867.

145[28] Q. You know it was cold weather?

A. My reason for knowing it was somewhat cold is, my brother had an overcoat on when he came home, and it had a little slit in it, the result of that occurrence.

Q. You knew it then immediately after the fight?

A. Yes, sir.

Q. Did you have any consultation with any person, or reflection in your own mind, about what the effect of your statement would be if you admitted that you knew about that controversy before you got your deed?

A. I had no consultation with any one as to the effect it would have, nor did any one say anything to me, or intimate anything to me in any manner or shape, as to what effect it would have.

Q. Your brother nor any one else?
A. No, sir.
Q. How came you to be reflecting about it?
A. I testified that I was not positive when it occurred, and I was not at that time. I had not given the thing any thought, but I knew it occurred that season. Having testified that way, saying I was not positive when it occurred, I naturally thought more and more as to when it did occur.
Q. You say it was cold weather because he went away with his overcoat on and came back with it torn?
A. I did not say so. I said from the fact that he had an overcoat on when he came back, in which there was a torn place. I thought it must be cold weather, and I think so yet.
Q. And you knew of the fight when you saw the overcoat?
A. Not till I was told about it. The overcoat did not tell anything.

SAMUEL N. SIMPSON being recalled, testified as follows:

Q. Are you the party who had the little unpleasantness, called a fight, with L. T. Smith?
A. I had a little altercation with Mr. Smith.
Q. Tell as near as you can when it took place.
A. It was in the year 1867 or 1868. I don't recollect which side of New Year it was.

Cross-examination:

Q. Was it not on Christmas day?
A. I don't think it was. I don't recollect of having such a contest on Christmas day.
Q. Was it not between Christmas and New Years?
A. I can't say which side of New Years it was.
Q. What is your recollection?
A. My recollection is, it was not far from New Years, but on which side of it I can't say.
Q. You did get your coat torn?
A. There was a little cut in it.

Defendants then offered to read the deposition of E. M. Bartholow a copy of which is as follows, to wit:

E. M. BARTHOLOW, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposes and says that:

Examined by W. W. Nevison, attorney for defendants:

Question. State your name, age, and place of residence.
Answer. My name is Elijah M. Bartholow; age, fifty-three years; residence at Lawrence, Kansas.
Q. State whether you were engaged, as agent, in the sale of lands in the State of Kansas.
A. Yes.
Q. Have you ever been acquainted with the lands of the Delaware Reserve, so called, which were bargained by the U P. Railway Company, E. D., to R. M. Shoemaker & Company, in A. D. 1865, and were held in trust for said Shoemaker & Company by Judge Jewett, of Ohio, Judge Devereux, of Kansas, or Wilson Shannon, jr.?
A. I have.
Q. Have you, at any time, been acquainted with the lands donated by Congress, or obtained by treaty from Congress, in aid of the construction

of the U. P. Railway, Eastern Division, and bargained by said Company to R. M. Shoemaker & Co., or Shoemaker, Miller & Co.?

A. Yes, I have.

Q. If you have been at any time engaged as agent for the sale of the lands described in interrogatories Nos. 3 and 4, you will state 146[29] when your agency commenced and when it terminated?

A. I was agent. My agency commenced in August, A. D. 1865, and it terminated in April, A. D. 1868.

Q. Were you engaged at the public sale of the Delaware and other lands held for R. M. Shoemaker & Company, April 2d, 3d, and 4th, A. D. 1867?

A. I was.

Q. Who advertised that sale, and who signed the bonds given to purchasers of lands at that sale?

A. I did.

Q. Who kept the books of registry of said lands, including sales?

A. I did.

Q. Did any lands remain undisposed of at that sale?

A. Yes.

Q. What lands were included in that sale?

A. The lands purchased of the Delaware Indians by the Leavenworth, Pawnee and Western Railroad Company, and known as the Delaware Reserve.

Q. Did you, or did you not, subsequently sell some of the lands undisposed of at private sale and give bonds for deeds?

A. I did.

Q. You will look at the contract marked "A," and attached to this deposition, and state who executed the same, and in whose behalf?

A. I executed it, and in behalf of the Union Pacific Railway Company, E. D., R. M. Shoemaker & Company, Shoemaker, Miller & Company, and John D. Perry.

Q. State what, if anything, you said to the Simpsons mentioned in said contract, or either of them, in relation to your authority to make and sign said contract.

A. I don't recollect.

Q. What authority, if any, had you to make and execute said contract?

A. I had verbal or written authority from one or both, but now don't remember.

Q. To what attorney, if any, did you submit that contract?

A. I think I submitted it to Gov. Shannon.

Q. State when, if ever, you had any conversation with Thomas L. Price in relation to said contract.

A. I had a conversation with Price in relation to some contract, but I can't tell whether it was this contract or some other, and don't remember when it was.

Q. When, if ever, did Price or Shoemaker object to said contract, or blame you for making it?

A. I don't remember that they ever did.

Q. State when, if ever, you delivered to said Simpsons three drafts, amounting in the aggregate to $6,500, referred to in the opening part of said contract.

A. I think I recollect giving drafts to some amount in conformity to said contract; I think they were for the amount mentioned in the contract, and I gave them to Simpson Brothers.

Q. What knowledge, if any, have you that those drafts were paid or refused?

A. I don't remember whether they were paid or refused.

Q. Were you acquainted with a copartnership known as "The Delaware Lumber Company," and if so, who composed the firm?

A. I was acquainted with the company. It was organized by J. A. Lane, Simpson Brothers, Judge J. C. Burnett, and myself. I also took shares in the company for John D. Perry, or rather entered his name for shares.

Q. What position, if any, did you hold in that company?

A. I was named as president, but I believe the contract of copartnership never was signed.

Q. What debts, if any, did you and Henry M. Simpson jointly pay of said company?

A. I believe we paid the debts named in the contract above referred to, marked "A," and as required by that contract.

Q. Who furnished you the funds or means that you used to pay those debts?

A. I believe the U. P. Railway Company, Eastern Division.

Q. Do you know of R. M. Shoemaker's receiving any of the money or proceeds of sale for any of the lands sold by you as agent?

A. I don't know whether he received any money, but there was proceeds entered to his credit on the books.

147[30] Cross-examination of E. M. Bartholow by Hon. John P. Usher, attorney for plaintiffs:

Q. During the time that you were engaged in selling the Delaware lands referred to in your examination-in-chief, who were you acting for as agent?

A. For the U. P. Railway Company, Eastern Division.

Q. What was your title?

A. Land-agent. I always signed the bonds as land-agent for the U. P. Railway Company. I think I had an official appointment as land-agent of the company.

Q. Were you acquainted with, or did you have any knowledge, of a firm known by the name of Shoemaker, Miller & Company?

A. I had.

Q. Do you know who composed that firm?

A. I don't know that I know all; my knowledge exists so far as knowing that Shoemaker called himself one of the company, and my understanding was that John D. Perry was connected with it; also Carlos Greeley, Adolphus Meir, Thomas L. Price, Judge Usher, and other directors of the company.

Q. Do you know that any of the directors of the railroad company were members of the firm of Shoemaker, Miller & Company?

A. I have official or positive knowledge of the fact.

Q. What was the business of that firm?

A. It was my understanding that they were contractors for building a portion of the Union Pacific Railroad.

Q. What portion?

A. The portion from Fort Riley to Sheridan, I believe.

Q. Do you know of that firm having any business in Lawrence, or with the defendants, or with his brothers, S. N. or H. M. Simpson, or either or all of them?

A. No further than is implied by the signing of the contract there.

Q. In whose handwriting is the paper, marked "A," referred to?

A. I don't know.

Q. Who made the original draft of the paper or dictated it?

A. I don't remember.

Q. At the time of the execution of this paper by you who was present?

A. I don't remember.

Q. Was any member of the firm of Shoemaker, Miller & Company present? If so, state whom.

A. There was not, I think.

Q. Are you able to state that any member of the firm of Shoemaker, Miller & Company knew that you were about to execute this paper and knew its contents?

A. I cannot say, positively.

Q. Had there been, anterior to the execution of this paper, a settlement between the Simpsons and R. M. Shoemaker & Company respecting the transactions of the Delaware Lumber Company and the claim of S. N. Simpson to locate town-sites on the railroad company's lands?

A. There was a settlement similar to what is stated there in the contract.

Q. Did you negotiate that settlement in whole or in part? And, if in part, state who was connected with you?

A. I did in part, and I think Gen. Price had something to do with it.

Q. In that settlement was there any matter of any transaction that had ever occurred between Shoemaker, Miller & Company and the defendant, William Simpson, or either of the Simpsons, taken into account or mentioned? If so, state what it was.

A. Nothing at all further than what is stated in that contract.

Q. Was there, in fact, any matter of difference between Shoemaker, Miller & Company and the Simpsons ever to your knowledge, or did they ever have any dealings together in any shape or form to your knowledge, or was there anything considered between them at the time or anterior to the making of the paper marked "A?"

A. Not to my knowledge.

Q. Was not the name of Shoemaker, Miller & Company inserted in the paper marked "A" at your suggestion, or by you in the original draft of the paper, with a view of making an end of all controversies in all matters in which Shoemaker was in any way connected?

148[31] A. On reflection, I think it was at the suggestion of myself or others to include all concerned in the business that might relate to it.

Q. Had the Simpsons, at that time, a suit or suits against Shoemaker or the railroad company, or threatened suits?

A. They either had or threatened against one or the other, but I don't recollect.

Q. Do you now remember that you were ever directed by any member of the firm of Shoemaker, Miller & Company to include the name of that firm in the paper marked "A," or to sign the name of that firm to it.

A. I do not.

Q. Were you ever the agent of that firm for the transaction of any business for it, or in its name? If so, state the nature of your appointment, whether in writing or verbal, who appointed you, and what business or duties were you appointed to perform. State fully.

A. I never was the agent of that firm, either by verbal or written appointment.

Re-examined by W. W. Nevison for the defendants:

Question. Who signed the name of Shoemaker, Miller & Company to the contract marked "A," attached to this deposition?

Answer. I signed it.

Q. If you were not the agent of that firm by verbal or written appointment, how came you to sign the name of that firm to that contract?

A. I signed it by either written or verbal advice, but don't remember whether I was advised to include all the firm's name or not, or whether I did that at my own discretion; that I can't remember.

Q. Who advised you to sign the name of a firm to a contract without any authority from the firm given you so to do?

A. As far as my memory serves, Perry or Shoemaker, or both, either verbally or in writing, to sign the contract.

Q. Did you or did you not sign the name of Shoemaker, Miller & Co. to that contract without any authority from the firm of Shoemaker, Miller & Company, or any member of that firm so to do?

A. I signed the contract by verbal or written authority from Perry or Shoemaker, but do not remember that I was particularly instructed to sign any one name of any one of the firm. I may have done it at my own or others' suggestion for the purpose of settling all questions that might arise in regard to the business of the railroad company.

Q. To whom did you suggest the propriety of your signing the name of the firm of Shoemaker, Miller & Company to that contract when you had no authority from them so to do?

A. I don't remember.

Q. Who was present when you signed that contract?

A. I don't remember.

Q. Was any member of the firm of Shoemaker, Miller & Company, or any of the persons, present whose names you signed?

A. I think not, sir.

Q. Then you signed that contract, and all the names of the persons thereto attached, in the absence of all of said persons, without the authority of them, or either of them, either at the suggestion of yourself made to yourself so to do, or at the suggestion of some person by them not authorized so to do, did you?

A. No, sir; I signed the contract either by verbal or written authority by Shoemaker or Perry, or both, but I do not think they expressed particularly the firm's name; but, acting for the railroad company as my general business, my impression is that I may have used the names at my own discretion, believing it to be best for the interest of the railroad company.

Q. By what authority did you sign the name of John D. Perry to that contract?

A. By either written or verbal authority, which I do not remember.

Q. Who gave you that written or verbal authority?

A. Perry.

Q. Were you, about the time you signed this contract, or prior thereto, ever the agent of Shoemaker, Miller & Company? If so,
149[32] when did your agency commence and when did it cease, and who appointed you such agent?

A. I never was their agent.

Q. Were you ever the agent of R. M. Shoemaker & Company?

A. I never was.

Q. Were you ever the attorney of R. M. Shoemaker & Company, or Shoemaker, Miller & Company?

A. I never was.

Q. If you were never the agent or attorney of Shoemaker, Miller & Company, or of R. M. Shoemaker & Company, how came you to be en-

gaged in negotiating a settlement between R. M. Shoemaker & Company and S. N. Simpson?

A. I did it because it was a matter in which the railroad company was concerned, I supposed, at least.

Q. In what respect was the railroad company concerned in the securing of a settlement between R. M. Shoemaker & Company and S. N. Simpson?

A. I cannot say positively. They seemed to be concerned in the same business, or about the same business.

Q. What was that business in which they were concerned in the same?

A. In the construction and building of the railroad.

Q. Was you acting for the railroad company in any other respect than as land-agent?

A. Not unless called upon. My business was land-agent.

Q. What officer of the railroad company, if any, requested you to assist in the procuring of a settlement between R. M. Shoemaker & Company and S. N. Simpson? And if no officer of the company requested you so to do, please state who did.

A. I don't remember that any officer of the company requested me to settle, especially for R. M. Shoemaker & Company. I think I was requested by Perry to make the settlement referred to, or something similar.

Q. How many settlements did you assist in making between R. M. Shoemaker & Company and S. N. Simpson?

A. I don't remember ever making any, unless that one there would be considered a settlement—the contract marked "A."

Q. Did you ever assist in making any settlement between R. M. Shoemaker & Company, or Shoemaker, Miller & Company, and S. N. Simpson, prior to the settlement mentioned in the contract marked "A," attached to this deposition?

A. No, sir.

Recross-examination by Judge Usher:

Question. Do you know what those money-drafts mentioned in paper "A," upon Palmer, were drawn for?

A. They were drawn to pay Simpson Brothers, in conformity to that contract.

Q. Were they drawn for any claim that Simpsons, or either of them, had on Shoemaker, Miller & Company?

A. No further than that contract would imply.

Q. Who settled the amount those drafts should be given for?

A. I presume I did in part, at least.

Q. Who aided you?

A. I don't remember, unless General Price did.

Q. Now, was there included in the sum of those drafts anything on account of any demand which the Simpsons had against Shoemaker, Miller & Company?

A. I don't remember.

Q. Do you remember what the drafts were given for, or any item of them?

A. I don't remember without looking at the contract.

Q. Did Shoemaker or Perry ever give you any directions as to the form or contents of the paper that you should sign touching that settlement?

A. I don't think they did.

Q. Did or has Shoemaker or Perry, or either of them, to your knowledge, see or seen that paper before or after you signed it?

A. Not to my knowledge, that I remember.

Q. Do you know whether they, or either of them, know to this
150[33] day the contents of that paper, or that you signed it, using their names?

A. I do not.

Re-examination by W. W. Nevison:

Question. You say that you assisted in the negotiation of the settlement mentioned in that paper, and agreed upon the amount that was to be paid Simpsons; did not you communicate to John D. Perry or R. M. Shoemaker, or to some member of the firm or firms of which they were members, the terms of the settlement you had made for them with the Simpsons?

A. I think I communicated with W. J. Palmer. I don't think I communicated with either Perry or Shoemaker. I don't remember communicating it to any member of the firm, unless Palmer was a member. My custom in writing to the company was through Palmer, generally.

Q. Then you was instructed, was you, by J. D. Perry, to negotiate said settlement and sign his name to the contract, and yet you have never informed him by letter, or otherwise, of the terms of the settlement you made in pursuance of such instructions. Is that the fact?

(Question objected to by Judge Usher, on the ground that it assumes a state of facts that has neither been asked nor answered before, and is leading.)

A. My impression naturally is, that he would be informed by W. J. Palmer, to whom I usually communicated any business done for the company.

Q. State if, at any time, you communicated to W. J. Palmer the terms of the settlement embodied in the contract marked "A?"

A. I don't remember.

Q. What is your recollection as to that matter?

A. I don't recollect anything about it that I can say positively.

Q. State if you recollect of drawing on Palmer for the amount to be paid to Simpsons.

A. I think I drew on Palmer for the amount. The contract may state otherwise. I cannot remember positively.

Q. State if your recollection is that you drew on Palmer for the amount of money to be paid Simpsons in the settlement with them without communicating to him the terms of the settlement you had made with them?

A. I think I drew on him for the amount; and the probability is I informed him of the terms—provided I drew upon him, which the contract will probably decide.

Q. Then, if it turns out that you did not draw on him for the money, what is the probability of your informing him of the terms of the contract?

A. I may have informed him in either case of the terms of the contract.

Q. What is your best recollection about your informing him of the terms of the settlement?

A. As nearly all my correspondence was with Palmer, the secretary and treasurer of the railroad company, I undoubtedly informed

him of the terms of the settlement. John D. Perry at that time was president of the company.

(Signed) E. M. BARTHOLOW.

Which said deposition was taken on due notice & is properly cerfied, & had been duly filed in said action, in said court, in due time and months before the trial of said action commenced.

Plaintiffs objected to its being read, because E. M. Bartholow is now present in the court room.

It was admitted by the parties hereto that E. M. Bartholow is a resident of Lawrence, Douglas County, and was, at the time the deposition was taken, and that he is now present in court.

Whereupon the objection of plaintiffs was by the court sustained; to which ruling of the court defendants then excepted.

H. M. SIMPSON, being recalled, testified as follows:

Q. Look at this paper, and state if you are familiar with the handwriting of the persons whose signatures purport to be there?

A. Yes, sir; I know the handwriting. I saw those names signed.

Q. All of them?

A. Yes, sir.

151[34] Q. This paper purports to have been signed by E. M. Bartholow for several persons. Are you acquainted with Mr. Bartholow's handwriting?

A. Yes, sir; I saw Mr. Bartholow sign them.

Q. The other names you also saw signed?

A. Yes sir.

Defendants then offered in evidence the paper referred to, purporting to be a contract of settlement; a copy of which paper is as follows, to wit:

Know all men by these presents that we, S. N. Simpson, Henry M. Simpson, and William A. Simpson, on the part of each other individually, and for and in behalf of the firm of Simpson Bro's, of the city of Lawrence, Kansas, hereby agree with the Union Pacific Railway Company, E. D., to make the following settlement of all accounts, claims, and demands, of whatever nature and kind now existing between said parties and said railroad company, with the express understanding that neither party shall have any right in law or equity to claim, ask, or receive any other property, money, or credits, for or on account of any transaction or business of whatever kind or nature, from the other, except as hereinafter specified, to wit: Said S. N. Simpson, H. M. Simpson, and W. A. Simpson, Simpson Bro's, agree to receive in full satisfaction and payment, as aforesaid, from said railroad company, the sum of six thousand five hundred dollars, or in lieu thereof the sum of four thousand dollars in money, and north half of southeast quarter of section twenty-nine, (29,) township twelve, (12,) range twenty, (20,) containing eighty (80) acres of land.

It is understood that this settlement includes a settlement of all claims against the Delaware Lumber Company, R. M. Shoemaker & Co., Shoemaker, Miller & Co., and John D. Perry, and also all claims that the said parties, or either of them, hold against us.

This does not include a certain list of claims hereunto annexed against the Delaware Lumber Company, which said claims, if just in part or in whole, are to be paid as follows, to wit:

Members of the railroad company, three-fourths	$\frac{3}{4}$
H. M. Simpson, one-eighth	$\frac{1}{8}$
Estate of Gen. Lane, one-eighth	$\frac{1}{8}$
	100

Nor does it include the ground to be occupied for railroad and depot purposes in North Lawrence, or the Stevens mortgage on North Lawrence.

H. M. SIMPSON.
S. N. SIMPSON,
per H. M. SIMPSON.
SIMPSON BROTHERS.

Liabilities of the Delaware Lumber Company, July 16, 1866.

Ridenour & Baker	$369 48
Griffith & Duncan	117 34
Filley & DeWolf	33 26
J. Gist	149 39
H. Leonard	141 97
Mrs. Pechacker	80 00
J. L. Pettibone	21 66
Allen Frederick	5 00
H. Paul	7 90
John Sarcoxie	56 17
Jesse Loudon	7 50
E. H. Wheeler	38 83
C. Carces	23 00
Maffatt	27 50
Shannon	15 00
Baker	27 50
152[35] V. Ball	10 72
Mann & Co	29 73
Hanson & Co	92 30
Allen	6 50
D. Ralph	126 00
Frenchman	106 50
O. Armstrong	213 00
J. N. Stein	23 70
Start & Wallace	5 20
James Jefferson	201 94
Jerry Gore	10 00
John Gore	15 70
George Bradley	33 18
C. Crouse	16 60
C. F. Fowler	25 12
W. Carleton	27 25
J. Glimpe	86 87
S. M. Hays	22 37
A. Ferrill	13 50
J. C. Burnett, suit in court not over	400 00
Menger, agreement by Shoemaker & Simpson	3,200 00
Timber at Miller's mill	900 00
Cha's Thornton	18 08

Ford & Eldridge	
Three acres of land due Big Nigger	
land due Joe Johnston	
Samuel Stiffey, for corn	8 13
Note to Butterfield	85 00
Holland & Bowers	138 21
Kimball Brothers	300 00
Allen Barnes	58 74
Indian Timber, ¾ year	1,050 00

It is further agreed that if any amount is legally due Duncan & Co., that the Union Pacific Railway Company, E. D., will assume and pay the same; and that if any amount is legally due Jackson & Matthews, that Simpson Bros. will assume and pay the same. And that a certain suit now pending in the district court of Douglas County, Kansas, in which Henry M. Simpson is plaintiff, and R. M. Shoemaker & Co. are defendants, is included in the settlement hereinbefore made, and the said Simpsons will dismiss the same at their own cost.

SIMPSON BROTHERS.
H. M. SIMPSON.
S. N. SIMPSON.
W. A. SIMPSON.

Whereas E. M. Bartholow, for R. M. Shoemaker & Co., has this day delivered to Simpson Brothers his certain drafts on W. J. Palmer, as treasurer of the Union Pacific Railway Company, E. D., being three in number, and amounting in the aggegate to six thousand five hundred dollars:

Now, therefore, the said Simpson Brothers, and S. N. Simpson, H. M. Simpson, and W. A. Simpson, acknowledge and promise that said drafts, when paid, shall be a full satisfaction of all accounts, claims, and demands now held by them, or belonging to them, against said R. M. Shoemaker & Co., Shoemaker, Miller & Co., John D. Perry, or the Union Pacific Railway Company, E. D., except as hereinafter specified.

And in consideration of the above release, the said Union Pacific Railway Company, E. D., John D. Perry, R. M. Shoemaker & Co., and Shoemaker, Miller & Co., acknowledge full payment and full satisfaction for and on account of all claims, demands, and accounts against said Simpsons, or either of them, belonging to said Union Pacific Railway Company, E. D., John D. Perry, R. M. Shoemaker & Co., Shoe-
153[36] maker, Miller & Co., except as hereinafter specified. But it is understood that this settlement does not apply to any claims connected with the Stevens mortgage, (so called,) or with any property in North Lawrence, held and occupied, and owned jointly, by any of the parties hereto, or held and occupied for railway purposes. Nor does it apply to the debts of the Delaware Lumber Company, an approximate estimate of which is hereto annexed, and which, so far as the same are just, are to be paid in the following proportion:

R. M. Shoemaker	one-eighth.
R. M. Shoemaker & Co	four-eighths.
J. D. Perry	one-eighth.
H. M. Simpson	one-eighth.
Estate of Gen. Lane	one-eighth.

Nor does it apply to any shares of stock in the capital of said railway company, which the said S. N. Simpson may claim to own.

It is further agreed that if any amount is legally due Duncan & Co., that Union Pacific Railway Company, E. D., will assume and pay the same; and that if any amount is legally due Jackson & Matthews, that Simpson Brothers will assume and pay the same. And that a certain suit now pending in the district court, Douglas County, Kansas, in which Henry M. Simpson is plaintiff, and R. M. Shoemaker and others are defendants, is included in the settlement hereinbefore made, and the said Simpsons will dismiss the same at their own cost.

W. A. SIMPSON,
SIMPSON BROTHERS,
S. N. SIMPSON,
Per H. M. SIMPSON.
H. M. SIMPSON.
UNION PACIFIC RAILROAD CO., E. D.
R. M. SHOEMAKER & CO.,
SHOEMAKER, MILLER & CO.,
JOHN D. PERRY.,
By E. M. BARTHOLOW.

LAWRENCE, KANSAS, *May* 10, 1867.

Plaintiffs objected because proof has not been offered to make the instrument competent, which objection was by the court sustained; to which ruling of the court defendants then excepted. But afterwards & during the trial of said action the court reversed its last-mentioned ruling, & said defendants then read the same in evidence.

Defendants then offered in evidence the deposition of John P. Devereux, a copy of which deposition is as follows, to wit:

JOHN P. DEVEREUX, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith:

I have in my possession two instruments of writing, one dated May 1, 1867, and the other dated May 10, 1867, copies of which are hereto attached, marked "A." (By consent the further taking of this deposition is adjourned until Monday, February 21, 1870, at 9 o'clock a. m., to enable the notary to make copies of said instruments of writing.)

Monday, February 21, 1867, the further taking of these depositions are resumed as per adjournment.

JOHN P. DEVEREUX, re-called, deposeth and saith:

I have compared the copies hereto attached, marked "A," with the originals now in my possession, and find them true copies. I received the originals from the secretary of the Union Pacific Railway Co., E. D., now the Kansas Pacific Railway Co. It is my understanding that Gen. T. L. Price and E. M. Bartholow, of Lawrence, negotiated this settlement. I knew that a settlement was being negotiated at
154[37] the time it was made. I saw the original copy of the settlement, or what purported to be a copy of it, soon after it was made. On the 10th day of May, 1867, and at the time this settlement was made, I was one of the trustees of R. M. Shoemaker & Co., in the matter of their interest in the lands known as the Delaware land, and was in the employ of the Union Pacific Railway Company, E. D. No officer of said railway company, nor any member of the firms of R. M. Shoemaker &

Co., or Shoemaker, Miller & Co., have ever informed me that this settlement was not authorized; and I have no recollection of ever having any conversation with them, or either of them, upon the subject.

I understand that John D. Perry, Thomas L. Price, and Judge Usher were interested in the business and profits of the firms of R. M. Shoemaker & Co. and Shoemaker, Miller & Co.

The drafts spoken of in this settlement are not in my possession, though I know that the secretary believed he had forwarded them to me at the time he sent me the papers relating to the settlement.

JNO. P. DEVEREUX.

(Plaintiffs objected to the copies attached to the deposition being read, because they are incompetent, and no proof having been introduced to make secondary evidence competent; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Defendants then offered in evidence an agreement filed in this action, and which, by consent of plaintiffs, was to be considered as the deposition of the absent witnesses. A copy of which paper is as follows, to wit:

STATE OF KANSAS,
Leavenworth County, ss:

In the district court in and for Leavenworth County, Kansas.

CARLOS S. GREELEY ET AL.
v.
WILLIAM A. SIMPSON ET AL.

The said WILLIAM A. SIMPSON, defendant, being duly sworn, doth depose and say that Carlos S. Greeley, the plaintiff, S. T. Smith, and one Colonel Lamborn, whose first name is forgotten by the affiant, are material witnesses for them in the trial of this action, without whose testimony the defendants cannot safely go to trial; that all of said witnesses reside in St. Louis, in the State of Missouri; that he believes that he can obtain the depositions of said persons before the next term of this court; that he believes said Carlos S. Greeley will state and testify that he is the treasurer of the Kansas Pacific Railway Company; that, at and previous to time of the date of the settlement mentioned in the defendants' answer, and for a long time afterwards, to wit, more than a year, he was a member of the firm of R. M. Shoemaker & Co., in said settlement mentioned, and of said Shoemaker, Miller & Co., also in said settlement mentioned; that J. D. Perry and General Price were also members of said firms; that they held the same rights in those firms that he did, or that any other member did; that they signed the same copartnership organization that he did; that, in the year 1867, E. M. Rartholow was engaged as agent for the care and sale of lands of said firm of R. M. Shoemaker & Co. in the State of Kansas; and that, on or about the day of , 1869, the precise time he cannot state, Mr. Neveson, as the attorney for defendants, demanded of said Greeley to produce, when said Greeley was giving his deposition, as hereinafter stated, the organization papers of said Shoemaker, Miller & Co., and that said Greeley searched for but could not find said papers; and that affiant believes that such testimony, if given by said Greeley, would be true.

That affiant believes said S. T. Smith will state and testify that he is auditor of said Kansas Pacific Railway Company, and was auditor

thereof at the time of the date of said alleged settlement, and has been ever since; that, in 1867, three drafts, in equal amounts, were
155[38] drawn on W. J. Palmer, then treasurer of said railway company, by said E. M. Bartholow, amounting in the aggregate to $6,500; that these drafts were paid, as they became due, for R. M. Shoemaker & Co., and were charged on the books of said railway company to said firm of R. M. Shoemaker & Co., and were allowed by R. M. Shoemaker on the settlement between him and the said railway company; and that affiant believes that such testimony, if given by said Smith, would be true.

That affiant believes that said Col. Lamborn will state and testify that he is the secretary of said Kansas Pacific Railway Company; that, in the year 1867, said E. M. Baltholow made a contract of settlement for R. M. Shoemaker & Co., Shoemaker, Miller & Co., J. D. Perry, and the Union Pacific Railway Company, with S. N. Simpson, H. M. Simpson and W. A. Simpson, and Simpson Brothers, which contract and the drafts connected therewith; the drafts above mentioned were for a long time kept in the office of the treasurer of said Railway Company, in St. Louis, Missouri, and that in December, 1869, he forwarded said contract and drafts to J. P. Devereux, of Lawrence, Kansas, to be used in a suit, Henry M. Simpson v. said Shoemaker, in the circuit court of the United States for the district of Kansas; and that affiant believes that such testimony, if given by said Lamborn, would be true.

Affiant further says that, believing the testimony of said witnesses to be material for him, previous to the last term of this court he took the depositions of each of them in St. Louis aforesaid; that the evidence given by said persons in said depositions was in substance the same as affiant has herein stated that he believes they will respectively testify; that it was while giving his said deposition by said Greeley that said Nevison demanded of him that he should produce the papers as above stated; that said depositions were filed in this court previous to the last term thereof, and were among the files during the last term; that affiant came to this city yesterday to try the case on this day; that on arriving here he learned that these depositions were missing from the files and could not be found; that he has not had them and doos not know where they are; that none of the defendants and none of the defendants' attorneys know where they are; that the defendants cannot prove the facts above stated by any person within the jurisdiction of this court; that he believes that by the next term of this court the defendants can again procure the depositions of the persons above named; and that the application for a continuance is not made for vexation or delay, but to obtain substantial justice.

So much of the above and foregoing as is in reference to what is therein claimed to be what Carlos Greeley, S. T. Smith, and Col. Lamborn would testify or show by their evidence, if given, is to be considered and treated as their depositions, and as if contained and stated in their depositions duly taken on proper notice and filed more than one day before the trial of the above-entitled action, and the same may be read in evidence on each and any trial of said action the same as depositions showing or stating the same facts could be. No more of the same is to be read than would be competent and relevant if contained in such depositions properly taken and filed; this agreement being intended to supply lost depositions properly taken and filed.

September 28, 1870.

N. COBB, *Att'y for Defendants.*
CROZIER & FENLON, *Att'ys for Plaintiffs.*

Plaintiffs objected to the words, "In 1867 three drafts in equal amounts were drawn on W. J. Palmer, then treasurer of said Railway Company, by said E. M. Bartholow, amounting in the aggregate to $6,500; that these drafts were paid as they become due for R. M. Shoemaker & Co., and were charged on the books of said railway company to said firm of R. M. Shoemaker & Co., and were allowed by R. M. Shoemaker on settment between him and the said railway company," because they are incompetent, irrelevant, and immaterial; which objection was by the the court sustained; to which ruling of the court defendants then excepted. But the court afterwards & during the trial of said action reversed its last-mentioned ruling, & then said defendants read the evidence so ruled out, as last aforesaid, as well as all of said agreement.

156[39] Plaintiffs also objected to the words, "In the year 1867 said E. M. Bartholow made a contract of settlement for R. M. Shoemaker, Shoemaker, Miller & Co., J. D. Perry, and the Union Pacific Railway Company, with S. N. Simpson, H. M. Simpson, and W. A. Simpson, and Simpson Brothers," because it is incompetent, irrelevant, and immaterial; which objection was by the court overruled; to which ruling of the court plaintiff then excepted.

Defendants then offered in evidence a certified copy of the answer filed in the circuit court of the United States in the case of H. M. Simpson vs. R. M. Shoemaker, a copy of which paper is as follows, to wit:

Answer.

UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court of the United States for the district of Kansas.

HENRY M. SIMPSON, PLAINTIFF,
versus
ROBERT M. SHOEMAKER, DEFENDANT.

FIRST DEFENSE.—And now comes the said Robert M. Shoemaker, and, for answer to the petition of Henry M. Simpson herein, denies each and every allegation therein, except the making of the contract alleged in said petition and copied therein.

SECOND DEFENSE.—And, for a second and further defense to said action, this defendant answers and alleges that after the making of the contract in said petition copied, to wit, on the 10th day of May, A. D. 1867, at Lawrence, Kansas, the plaintiffs herein, and S. N. Simpson, and William A. Simpson, in consideration of the delivery by E. M. Barthelow, for R. M. Shoemaker & Co., a partnership firm of which this defendant was the said R. M. Shoemaker, of three drafts drawn on W. J. Palmer, treasurer of the Union Pacific Railroad Company, E. D., amounting in the aggregate to six thousand five hundred dollars, agreed and promised to and with the said R. M. Shoemaker & Co., John D. Perry, and others, the said John D. Perry named in the last-named contract being the John D. Perry named in the contract copied in said petition; that when said drafts were paid it would be a full satisfaction of all claims, accounts, and demands then held by the said Simpson Brothers, and S. N. Simpson, H. M. Simpson, and William A. Simpson, gainst said John D. Perry, or against Shoemaker, Miller & Co., and against said R. M. Shoemaker & Co., except certain claims therein specified, of which the claim sued on in this action is not one, which

agreement was in writing, a copy of which is herewith filed, marked "A," and made a part of this answer. And the defendant avers that at the time said last-named contract was made said plaintiff held and asserted the claim on which he has brought this action against the said John D. Perry and against the said R. M. Shoemaker, and that said drafts, when paid, were to be a full satisfaction thereof; and this defendant avers that immediately thereafter said drafts were paid by the said W. J. Palmer, as such treasurer, to said Simpson Brothers, and that the payment of said drafts was a payment and satisfaction of the claim sued on in this action.

And this defendant avers that the suit mentioned in said last-named contract, as pending in the district court of Douglas County, wherein said Henry M. Simpson is plaintiff and R. M. Shoemaker and others were defendants, was an action which had theretofore been brought by the plaintiff against the defendant herein, and others, to recover, among other things, the same claim and damages for which this action is prosecuted, and that the payment of said drafts was a settlement in full of all the claims sued on in said action last named.

THIRD DEFENSE.—And, for a third and further defense to said action, this defendant avers that said claim sued on in this action was, in the month of May, 1867, fully paid and satisfied.

FOURTH DEFENSE.—And, for a fourth and further defense to said action, this defendant answers and alleges that, at the time of the
157[40] making of the contract set out in the petition of the plaintiff, the legal and equitable title to the lands therein described was vested in the United States in trust for the Delaware Nation of Indians, and that said lands were not a legal subject of contract between the parties named in said contract.

FIFTH DEFENSE.—This defendant, for a further and fifth defense to said action, alleges that said plaintiff has not at any time tendered to the defendant, nor to said John D. Perry, nor to said railway company, the price and amount which, by the terms of the said contract, he was to pay on the making of a deed for said lands; nor has said plaintiff at any time tendered to said parties, or either of them, any part of the amounts so to be by him paid on the making of such conveyance.

Whereof said defendant prays to be discharged with his costs.

STILLINGS & FENLON,
Attorneys for Defendant.

EXHIBIT "A."

Whereas E. M. Bartholow, for R. M. Shoemaker & Co., has this day delivered to Simpson Brothers his certain drafts on W. J. Palmer, as treasurer of the Union Pacific Railway Company, E. D., being three in number, and amounting in the aggregate to six thousad five hundred dollars:

Now, therefore, the said Simpson Brothers, and S. N. Simpson, H. M. Simpson, and W. A. Simpson, acknowledge and promise that said drafts, when paid, shall be a full satisfaction of all accounts, claims, and demands now held by them, or belonging to them, against said R. M. Shoemaker & Co., Shoema*ma*ker, Miller & Co., John D. Perry, or the Union Pacific Railway Company, E. D., except as hereinafter specified.

And in consideration of the above release, the said Union Pacific Railway Company, E. D., John D. Perry, R. M. Shoemaker & Co., and Shoemaker, Miller & Co., acknowledge full payment and full satisfaction for and on account of all claims, demands, and accounts against said Simp-

sons, or either of them, belonging to said Union Pacific Railway Company, E. D., John D. Perry, R. M. Shoemaker & Co., Shoemaker, Miller & Co., except as hereinafter specified. But it is understood that this settlement does not apply to any claims connected with the Stevens mortgage (so called) or with any property in North Lawrence, held and occupied, and owned jointly by any of the parties hereto, or held and occupied for railway purposes. Nor does it apply to the debts of the Delaware Lumber Company, an approximate estimate of which is hereto annexed, and which, so far as the same are just, are to be paid in the following proportion:

R. M. Shoemaker	One-eighth.
R. M. Shoemaker & Co	Four-eighths.
J. D. Perry	One-eighth.
H. M. Simpson	One-eighth.
Estate of Gen. Lane	One-eighth.

Nor does it apply to any shares of stock in the capital of said railway company which the said S. N. Simpson may claim to own.

It is further agreed that if any amount is legally due Duncan & Co., that Union Pacific Railway Company, E. D., will assume and pay the same; and that if any amount is legally due Jackson & Matthews, that Simpson Brothers will assume and pay the same. And that a certain suit now pending in the district court, Douglas County, Kansas,
158[1] in which Henry M. Simpson is plaintiff and R. M. Shoemaker and others are defendants, is included in the settlement hereinbefore made, and the said Simpsons will dismiss the same at their own cost.

W. A. SIMPSON,
SIMPSON BROTHERS,
S. N. SIMPSON,
Per H. M. SIMPSON.
H. M. SIMPSON,
UNION PACIFIC RAILROAD CO., E. D.
R. M. SHOEMAKER & CO.,
SHOEMAKER, MILLER & CO.,
JOHN D. PERRY,
By E. M. BARTHOLOW.

LAWRENCE, KANSAS, *May* 10, 1867.

[Five-cent stamp.]

(Endorsed:) No. 228. Henry M. Simpson, plaintiff, vs. Robert M. Shoemaker. Answer. Stillings & Fenlon, defendant's attorneys. Filed June 28, 1870. A. S. Thomas, clerk.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, do hereby certify that the above and foregoing is a true, full and complete copy and transcript of the defendants' answer filed in the clerk's office of said court, June 27, 1870, in a case pending in said court, wherein Henry M. Simpson is plaintiff, and R. M. Shoemaker is defendant, (numbered 228,) as the original remains on file.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in the city of Topeka, in said district, this 21st day of September, A. D. 1870.

[SEAL.] A. S. THOMAS, *Clerk.*

Clerk's fees $2.00.

(Plaintiff objected as incompetent, because there is no record to show there is any such case pending, and because pleadings are not evidence against a party except where the party himself signs them; which objection was by the court sustained; to which ruling of the court defendant then excepted.)

Defendants offered in evidence the deposition of F. E. Miltenberger, filed in this case, a copy of which deposition is as follows, to wit:

FERDINAND E. MILTENBERGER, of lawful age, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith, that

My name is Ferdinand E. Miltenberger; I reside in St. Louis, and my occupation is that of a book-keeper. In May, 1867, I was book-keeper for the firm of Haskell & Co., bankers, St. Louis City, Missouri. In May, 1867, (13th) Messrs. Haskell & Co., bankers, received from Simpson Bros., Lawrence, Kansas, by mail, three drafts, each for the sum of $2,166.66, dated on May 10, 1867, and severally due sixty, ninety and one hundred and twenty days after date. These drafts were drawn by E. M. Bartholow on W. J. Palmer, treasurer, at St. Louis. On same day said drafts were received by Haskell & Co., I, as their clerk, presented them for acceptance to John D. Perry, at the office of W. T. Palmer, who was then treasurer of the Union Pacific Railroad. Mr. Palmer, treasurer, was not present, and Mr. John D. Perry, who was at the time president of Union Pacific Railroad, accepted said drafts, endorsing thereon the following words: "Accepted by John D. Perry, for treas." All of these drafts were afterwards (on maturity) paid to Haskell & Co., holders. Perry paid the first draft in person. I don't
159[42] know who called to pay the other drafts. The usual bank notices of time drafts fell due were sent to the office of the Union Pacific Railroad Company by Haskell & Co.; and further deponent saith not.

(Plaintiffs objected to this part of said deposition from the words "In May, 1867," where they occur the second time, to the end of said deposition, as incompetent, irrelevant, and immaterial; which objection was by the court sustained; to which ruling of the court defendants then excepted. But the court afterwards, and during said trial, reversed its last-mentioned ruling, and the said deposition was read in evidence by said defendants.)

HENRY M. SIMPSON, being recalled, testified as follows:

Q. You are a brother of W'm A. Simpson?

A. Yes, sir.

Q. Did you ever see this contract before that is attached to these depositions?

A. Yes, sir.

Q. Who, on the part of Shoemaker, Miller & Co., if any one, participated in making the contract. Did they themselves or some person purporting to act for them?

(Plaintiffs objected as incompetent; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. Thos. L. Price and Mr. Bartholow were present when the contract was drawn.

Q. Do you mean the Thos. I. Price who is spoken of as a member of the firm?

A. Yes, sir; he was the man who negotiated with me principally.

Q. Why did he not sign it for the firm, if you know?

A. The contract was drawn up early in May, and Mr. Price told me he wished to explain it to his associates in St. Louis, and told me he was going down to do it. In four or five days it was returned with a few verbal alterations, and the second contract was drawn according to that. Gen. Price then said he wished to go up the road to get Mr. Shoemaker's assent to it, and left Lawrence, saying that was his purpose. He brought this back to me. I met him at the depot; he got off the cars, and said Shoemaker was willing, as to the firm he was engaged in, to make a settlement with the Simpsons, but was not willing to make a settlement individually; he was going to fight it out with them. He gave me a paper with something penciled on it, and said Mr. Bartholow would sign it if I would give him that line. After that Mr. Bartholow signed these names.

Q. Did you give Mr. Bartholow that line?

A. Yes, sir. A short time after that Mr. Perry was in Lawrence, and he and I run the contract through and made a list and figured up the amount of the debts of the Delaware Lumber Co. that there was no doubt about, and he authorized Mr. Bartholow to pay them. I was to pay one-eighth. Mr. Bartholow drew on St. Louis for the amount and I cashed the drafts.

(Plaintiffs objected to any statement about drafts as incompetent; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Witness resumed:

Different parties came and were paid, sometimes by Mr. Bartholow and sometimes by myself. Sometimes I went to Mr. Bartholow to get his part, and sometimes he would bring me receipts, and those debts were settled according to the direction of Mr. Perry.

Q. State if you ever sent to St. Louis but once three drafts drawn by Mr. Bartholow?

(Plaintiffs objected as incompetent; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. No, sir.

Q. Did you, after this contract was made, send such drafts to St. Louis?

A. I did.

Q. Do you know what was done with them after?

A. I got the money on them and have no doubt they were paid.

160[43] The examination of this witness was at this point temporarily suspended to allow defendants to examine another witness.

HARTWELL KENDALL, being duly sworn, testified as follows:

Question. Were you present at any time when S. N. Simpson offered any money to either Mr. Caldwell or Mr. Smith?

A. I went into Mr. Caldwell's office with Mr. Simpson, and he made a tender to Mr. Caldwell of, I think, about $1,400 in greenbacks.

Q. What did he say about it?

A. That it was about some improvements on some land.

Q. Did he say what the lands were?

A. No, sir.

Q. When was it?

A. About three years ago, when Mr. Caldwell's office was on Delaware street.

Q. Did you count the money?

A. I counted it before we went up there.
Q. Do you recollect the amount?
A. I think it was about $1,400. I took no memorandum of it.
Q. What did Mr. Caldwell say at the time?
A. Mr. Simpson said, it is good money. Mr. Caldwell said he presumed it was, and he did not very often refuse money.
Q. Did he take the money?
A. No, sir.
Q. Did he refuse to take it?
A. He said he presumed it was good money, and he did not often refuse money.
Q. Did Mr. Simpson give Mr. Caldwell an opportunity to take it?
A. Yes, sir.
Q. Did he offer it to him?
A. Yes, sir.
Q. What did Mr. Caldwell say in regard to taking it?
A. He said he did not doubt it was good money, and he did not often refuse money.
Q. Did Mr. Simpson hold it out to him?
A. He held it out in his hand.
Q. Were you present when any similar matter transpired with Mr. Smith?
A. No, sir; that was the only time I was ever there.

Cross-examination:

Q. How much money was there?
A. I think about $1,400.
Q. Did you count it?
A. I did before I went up there.
Q. It was two or three years ago?
A. I judge it was about that time, because Mr. Caldwell has been down in our neighborhood some time.

The examination of H. M. Simpson was here resumed:

Question. What claim or demand, as far as you know, had Shoemaker, Miller & Co. against you or any one of the Simpsons at the time this settlement was made?
Answer. The only claim I ever heard of was this land.
Q. He had made that claim before that time, had he?
A. I don't know whether you would call it a claim or not. At the time of the public sales of the land, early in April, Mr. Shoemaker and Mr. Perry spoke of that land to me. They did not say they claimed it. They said Simpson had a better title, and they were not going to claim it, but were going to take other lands.
Q. That was the only claim you know of that was unsettled between the Simpsons and that firm?
A. Yes, sir.

Cross-examination by plaintiffs:

Question. You were a partner of the plaintiff at that time?
Answer. I was a partner in the banking business.
Q. Who was present when you had the conversation with Mr. Perry and Mr. Shoemaker?
A. It was at the time of the public sale. I don't say that Mr. Perry and Mr. Shoemaker were together at the time of the conversation.
Q. Who was present when you had the conversation with Mr. Shoemaker?

A. I was.
Q. Who else?
A. Mr. Shoemaker.
161[44] Q. Who else?
A. I don't know.
Q. Who was present when you had the conversation with Mr. Perry?
A. Mr. Denman may have been; I am not sure.
Q. Do you recollect where it was?
A. Yes, sir.
Q. Where?
A. At the bank.
Q. State what that conversation was as well as you can.
A. Perry spoke of lands in North Lawrence which were about to be put up at auction. He got me to appraise some lots, as he and Shoemaker and Price thought of bidding on them. That was the subject of interview; and then he talked about the Delaware lands and about some trouble between him and Mr. Caldwell. He said he could have defeated the treaty of July, 1866, but Mr. Caldwell told him if he would not he would let him have part of the reserve at the same price as he got it; but Mr. Caldwell had broken his word, and they had to buy land at $20 per acre to get timber to build the road; and the matter about these lands came up.
Q. Did he say how much he had contracted for?
A. He said he bought timber-land to get ties.
Q. Did he say how much?
A. I knew how much, but I don't know how I knew.
Q. Whether from him or some one else?
A. I don't know how I knew.
Q. How much was there, if you know?
(Defendants objected as incompetent, and not a cross-examination; which objection was by the court overruled; to which ruling of the court defendants then excepted.)
A. I knew there was a large amount. Whether I knew the exact amount or not, I don't know.
Q. What was your idea of the amount at the time?
(Defendants objected as incompetent, irrelevant, and not a cross-examination; which objection was by the court overruled; to which ruling of the court defendants then excepted.)
A. I think very likely the idea was 8,000 acres of land.
Q. Who had you heard it from—S. N. Simpson?
A. No, sir; there was a person who had charge of chopping wood brought a map of some lands on which he said he was directed to chop.
Q. Where did he bring the map to?
A. To Lawrence.
Q. Did you have a conversation with S. N. Simpson about it?
A. I don't know that I did.
Q. Was Wm. A. Simpson present in the bank at the time of that conversation?
A. Not that I know of.
Q. Did you tell Wm. A. Simpson what Mr. Perry had told you?
A. No, sir.
Q. Have you told all that Mr. Perry told you in the bank about that matter?
A. Mr. Perry told me they had a contract by which they could have taken these lands.

Q. Who were "they"—did he say?
A. I understood who was meant; I don't suppose he did say.
Q. Was anything else said by him that you recollect?
A. I think he said their time was up for doing it.
Q. Their time was up for taking the land?
A. Yes, sir.
Q. This was in April of what year?
A. 1867.
Q. Had you any interest in this land in any way?
A. I had not.
Q. Had you any interest in it when S. N. Simpson claimed it?
A. No, sir.
Q. Had you after Williams' deed was made?
A. No, sir.
Q. Who drew that deed?
A. I suppose, from looking at it, I drew it. I was not aware that I drew it till I saw it in court.
Q. You at no time had any interest in this land?
A. No, sir.
Q. Did you tell William what Mr. Perry told you?
A. I have no recollection of it.
Q. He gave you no directions to give any one information on the subject that you recollect?
A. No, sir.
Q. That you say was in the bank?
A. Yes, sir.
Q. Where did you have the conversation with Mr. Shoemaker?
A. The conversation with Mr. Shoemaker was in the hall where the public sale took place.
Q. You have stated that you and he were present. If there was any one else who heard the conversation state it.
A. I don't remember.
Q. State as well as you recollect what was said by Mr. Shoemaker to you on that occasion.
A. There were to be some lands put up at public sale, in which I had one-eighth interest, and the other seven-eighths interest were to be offered at public sale, and the principal conversation was in reference to that. They were in the vicinity of these lands in controversy. I had made an agreement with Mr. Price to take two 40's and one 80, and let Shoemaker and his friends have the rest, which would be the seven-eighths stand. Before the bidding took place he wanted to know if I would stand to that arrangement. The principal conversation was about that.
Q. Were either of your brothers at that conversation, or within hearing?
A. One of them was present.
Q. Which on'?
A. S. N. Simpson.
Q. Where was William, present or at the bank?
A. I don't know of his being present at the sale, till a tract he wanted to get was reached. I don't remember seeing him at any other time.
Q. If he was within hearing at the time, you don't know it?
A. No, sir.
Q. Can you state any particular circumstance which causes you to remember these conversations about this Caldwell land now?

A. I was a member of the firm of the Delaware Lumber Co., associated with Mr. Perry and Shoemaker & Co., getting out timber and ties at different places on the southern part of the reserve, where these Caldwell lands are situated, and I had occasion to know something about Mr. Perry's plans about timber. This partnership was dissolved, and in settling up there were some debts to be paid. When Mr. Perry came to town some of the creditors would be following him and me trying to get us together to see if we would not fix it up. And our Delaware Lumber Company matters were investigated at that time. He was there several days, and we tried to fix up some of those debts. I don't know whether particularly that day, but during the sales we were together several times in connection with the Delaware Lumber Company, and the timber that had been cut off Caldwell's lands by the Company.

Q. Did you at that time know that your brother, S. N., claimed to have a deed to this particular tract of land?

A. I knew he claimed this tract of land. I don't know as I knew by what instrument. There was a Delaware Reserve map that this tract was marked out on, and I knew he claimed it, but I don't know as I knew by what instrument.

Q. You did not communicate to your brother William the conversations you had with Shoemaker and Perry about this land?

A. I don't know that I did.

Q. They did not request you to communicate it to any one, did they?

A. No, sir. It was rather incidental perhaps. The main subject was in regard to the lands in which I owned an undivided one-eighth interest, and the price of land in North Lawrence.

Q. But Mr. Perry distinctly complained of the way Mr. Caldwell had treated him about those lands?

A. Mr. Perry said he could have defeated the treaty of July, 1866, but helped it through with the understanding that he could have at cost price off the south part of the reserve whatever lands he wanted, and that understanding was not lived up to.

Q. And he had been compelled to undertake to pay $20 per acre to get timber to build the road?

A. Yes, sir.

163[46] Q. That was why he complained of Mr. Caldwell?

A. Yes, sir.

Q. You understood him to say he had selected this piece of land, but had given it up?

A. I understood that he could have selected it, but the time had passed. He told me the contract with Mr. Caldwell was not legal, and Shoemaker was making a fight on it, and he did not know but he would, and not take any of the land.

Redirect examination:

Question. You have spoken of a map brought to you by a woodchopper. State whether this map by which he was cutting contained these lands in controversy?

(Plaintiffs objected as incompetent, and not a re-examination; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. State what lands were described on that map?

(Plaintiffs objected as before; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. What were the contents of that map?

(Plaintiffs objected as before; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. Were the lands in controversy marked on that map; if so, how?

(Plaintiffs objected as before; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. How do you know it was a map?

(Plaintiffs objected as before; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. It purported to be a diagram of land.

Q. What land?

(Plaintiffs objected as before; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. State what you know, if anything, about E. M. Bartholow acting as agent for the plaintiffs?

(Plaintiffs objected as incompetent and not a re-examination; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

S. N. SIMPSON, being recalled, testified as follows:

Q. Are you acquainted with the lands in controversy?

A. Yes, sir.

Q. You know their location?

A. Yes, sir.

Q. You did in the spring of 1867?

A. Yes, sir.

Q. State whether there were any improvements put upon that land, or commenced, in the spring of 1867; if so, what?

(Plaintiffs objected as incompetent; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. I commenced building a house, and commenced clearing some land.

Q. Who commenced it?

A. I had some men commence it.

Q. Before or after you made the deed to W'm A. Simpson?

A. Before.

Q. What had been done?

A. I had made arrangements for clearing the land; the men had worked on it some, and I had commenced building a house.

Q. How far was the house advanced at the time you made the deed?

A. One house was up—a small one.

164[47] Q. How many rooms?

A. One.

Q. Was any one living in it?

A. No, sir.

Q. Did any one live in it that season?

A. Yes, sir; they went in in the fall.

Q. What time?

A. I think in September.

Q. Who?

A. Mr. Johnson.

Q. What relation did he occupy towards W'm A. Simpson?

A. He cleared some land for him in the winter of 1867-'8, and was there as a tenant of W'm A. Simpson.

Q. How about the other house?

A. That was not commenced till late.

Q. When was it commenced?
A. In the winter of 1867–'8. There was only one house commenced in the spring of 1867.
Q. What was done as to fencing at the time you made the deed to W'm A. Simpson?
A. One piece of fence was partly moved.
Q. Were there any enclosures on the land at the time you made the deed to W'm A. Simpson?
A. Yes, sir.
Q. How much was enclosed?
A. 150 acres, perhaps.
Q. What with?
A. With a rail-fence, mostly; then it run around so as to hit the river.
Q. The river formed part of the enclosure?
A. Yes, sir.
Q. Had any of it been in cultivation previously?
A. Yes, sir.
Q. Were there any cabins on it?
A. There were.
Q. How many?
A. Perhaps eight.
Q. State how much of that land was in cultivation, of the whole section, in the spring of 1867, or previously?
A. From 100 to 120 acres.
Q. How much was cultivated in 1867?
A. About that amount.
Q. Who cultivated it?
A. It was partly or mostly cultivated by parties who were on it. Some of it was cultivated under an arrangement made by myself, where the man was to have the crop, and commence improving, with the idea of remaining several years.
Q. When did you make the arrangement?
A. In the spring.
Q. Before you sold?
A. Yes, sir.
Q. Did he live on the place?
A. Yes, sir.
Q. How much did he cultivate?
A. A few acres he put in that year.
Q. Did he clear and grub the land?
A. Yes, sir; that is what I mean; he cleared a few acres and put a crop in.
Q. What were those persons who were on there?
A. White persons, mostly. One was there under an arrangement with Sarcoxie; the others were squatters.
Q. What do you call squatters?
A. Persons who go on the land without any arrangement, and commence living on it.
Q. Those were squatters?
A. One man had an arrangement with the Indians.
Q. That was in the spring of 1867?
A. Yes, sir.
Q. Was the land being improved during the year 1867?
A. None except what I have stated.
Q. How much of that land was being cultivated in 1868?

A. About 300 acres.

Q. Who put it in cultivation?

A. I did for my brother. I attended to the farming matters for him, and made arrangements for it to be put in.

Q. Have you been acquainted with the land all the time since February, 1867?

A. Yes, sir.

Q. How much wood has been taken off that land since you made the deed to your brother?

A. In the neighborhood of 800 cords.

Q. How much was that wood worth per cord in the tree?

A. From fifty cents to one dollar.

Q. Has there any more been taken off?

A. No, sir; it was about that. I don't mean to say it was exactly 800 cords.

Q. You were acquainted with the situation of the timber on it at that time?

A. Yes, sir. It was very poor timber.

1654⁸ Q. What was the situation of the timber on that land in the winter of 1866–'7?

A. There were about 500 acres of it laid west of Muddy Creek, between it and Lawrence. And persons from Lawrence had been going on it, till besides those fields cleaned on it, they had got almost everything off. The timber had been sold off to the saw-mills, and even the Lawrence people had picked up the chips and dug up the stumps. But on the east side of Muddy Creek there was more stuff left, and there the timber was taken off. There was hardly anything left that would make a stick of timber or a tie, but there was wood—the refuse—what was left.

Q. Do you know what the use of the uncultivated part of that land was worth?

A. Yes, sir.

Q. What was the uncultivated part of that worth per year each year?

A. It was not worth anything till it was grubbed and cleared.

Q. State whether you ever tendered any money to Mr. Caldwell or Mr. Smith; if so, when, and what for?

A. I tendered money in payment for the improvements, in accordance with the contract.

Q. When did you tender it to Mr. Smith?

A. I can't tell the month. It was in 1867.

Q. What time in the year?

A. I think it was in the fall.

Q. How much did you tender him?

A. $1,400.

Q. Where were you?

A. I think it was in the bank here I met him.

Q. What bank?

A. Judge Crozier's bank.

Q. In this city?

A. Yes, sir.

Q. What did you say to him when you tendered it to him?

(Plaintiffs objected as incompetent and irrelevant; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. I told him, in the presence of Mr. Kendall, who was a witness here, that I tendered him the money for the improvements that were on some land near Lawrence, in the Diminished Reserve; on the land he had conveyed to me on the 21st day of February, 1867.

Q. Who did you say that to?

A. To Mr. Smith, and very near the same to Mr. Caldwell.

Q. You say that you told Mr. Smith that you tendered it to him?

A. Yes, sir; for the railroad company. I tendered it to Mr. Smith for the railroad company for the improvements on the land I bought of the railroad company.

Q. What improvements?

A. The Indian improvements that were referred to in the deed and contract from the railroad co., by S. T. Smith to myself.

Q. Those that have been read in evidence?

A. Yes, sir.

Q. What did Mr. Smith say to that?

A. He declined taking the money, and said he would not take the money.

Q. Did he take the money at all?

A. No, sir.

Q. Tell what occurred between you and Mr. Caldwell in relation to the same matter. What you said to him, and what he said to you, and where it was.

A. It would rather strike me that we met on the street, and I told Mr. Caldwell that I had the money to pay for the improvements on the land that was bought at such a time, over near Lawrence, on the Diminished Reserve, and made a tender of it to pay for the improvements.

Q. How did you make the tender?

A. I handed the money to him.

Q. How much?

A. $1,400.

Q. What did he say to that?

A. He made some evasive answer, and smiled.

Q. Did he take the money?

A. No, sir.

Q. Did you offer it to him?

A. Yes, sir.

Q. You held it out to him?

A. Yes, sir.

Q. Tell when that was, as near as you can.

A. I think it was in the fall of 1867.

Q. Did he take the money at all from you?

A. No, sir.

Q. What sort of money was that you tendered to Mr. Caldwell?

A. Government greenbacks.

166[49] Q. What is commonly known as legal tender?

A. Yes, sir.

Q. What was it you tendered Mr. Smith?

A. The same kind.

Cross-examination:

Question. What part of that land was Sarcoxie living on?

Answer. On the north 80 that runs up from the main body of the land.

Q. Who were the persons who pretended to have a contract with the Indians for improving?

A. There was one man who lived on what was known as the Beaver improvement. I don't know his name.

Q. Was Beaver in the country at that time?

A. I don't think he was. He was south, as I understand it.

Q. Was his family here?

A. No, sir.

Q. You say those persons had contracts for improving; who from?

A. This one I referred to claimed to be living under Beaver; I don't know it.

Q. Was he one of the Delaware Indians?

A. Yes, sir.

Q. Were old Sarcoxie and young Sarcoxie Delawares also?

A. Yes, sir.

Q. Who were the other persons who were on there who had contracts with the Indians?

A. I don't know of any other who claimed to have a contract with the Indians. There was one who was a squatter.

Q. Were those all the persons on the land?

A. Yes, sir.

Q. You said something about seven or eight cabins?

A. Near the Beaver improvements were two or three cabins.

Q. Were there any persons living in them?

A. If there were they were colored men who went in as squatters.

Q. You don't know certain how many colored families were there. Did you hire them to do any work?

A. No, sir; I don't know as I did with those; I did with some there.

Q. When did Sarcoxie go away?

A. I think in the spring of 1868. They might have moved some before.

Q. He went with the principal part of the tribe in 1868?

A. Yes, sir; some went in 1867, and some that winter.

Q. How many had old Sarcoxie in his family?

A. Himself and wife, and a girl who lived there. I never saw but three in his own family.

Q. How many had young Sarcoxie?

A. Himself and wife; they had no children, I think.

Q. What relation did Sarcoxie bear to the tribe?

A. He was counsellor, and chief of one of the bands. I forget the name of the band.

Q. Were the Indians in the habit of going to see him?

A. Yes, sir.

Q. He was chief of the Turkey band?

A. Yes, sir.

Q. The wild Indians were in the habit of going to see him a good deal?

A. It appeared to be the headquarters of the wild Indians.

Q. How long had Beaver lived there?

A. Beaver was not there a great deal.

Q. How long had he had possession there?

A. I don't know.

Q. Had he since you knew it?

A. There had been a Beaver living there. I don't know much about it.

Q. Describe that Beaver.

A. He was a short man.

Q. Had he been in the service of the U. S.?

A. I understand he had been, under Fremont and others.

Q. State whether his family, when he was away, was around there?
A. I did not know he had a family.
Q. That man claimed to be under Beaver?
A. That is what I heard.
Q. State whether you took possession and control of the elder and younger Sarcoxie's land that they occupied.
(Defendants objected as not cross-examination; which objection was by the court overruled; to which ruling of the court defendants then excepted.)
A. I took possession of part of it.
Q. Did you give them anything for leave to go on there?
A. No, sir.
167[50] Q. How much was it worth a cord to cut wood?
A. Generally $1.50 per cord.
Q. What was it worth a cord to haul it to Lawrence?
A. About $2.00.
Q. What is wood worth a cord in Lawrence?
A. That kind of wood is worth about $4.50 per cord.
Q. How much did you say was in cultivation in 1867?
A. From 100 to 120 acres.
Q. How much in 1868?
A. Very near 300 acres.
Q. Is that inclusive of the Indian field?
A. Yes, sir.
Q. How much was in cultivation in 1869?
A. About 400 acres.
Q. How much this year?
A. A little more; not much.
Q. There were in cultivation about 150 acres when you went on there in 1867?
A. No, sir.
Q. Have you attended to that business for your brother?
A. Yes, sir.
Q. Who attended to receiving the rent?
A. The rent was paid in a certain share of the crop. I attended to delivering a share of the corn to him.
Q. You say you tendered Mr. Smith some money?
A. Yes, sir.
Q. Did he not tell you if you had any money to pay he thought you had better pay it at Washington?
A. I don't remember any such statement.
Q. Where did you get the money?
A. In Clark & Stone's bank.
Q. On whose check?
A. I did not give any. I told them if I did not bring the money back I would come in and settle it.
Q. Did you take the money back there?
A. Yes, sir.
Q. And left it with Mr. Clark?
A. Yes, sir.
Q. Have you ever seen it since?
A. No, sir.
Q. You don't know what has become of it?
A. No, sir.
Q. Did you make a special deposit of it there?
A. No, sir.

Q. You told them if you did not use it you would return it?

A. I told them if I used it I would come in and arrange it; if not, I would return it.

ALEXANDER CALDWELL, being recalled, testified as follows:

Question. How many persons acted as directors of the Missouri River Railroad Company in the years 1866 and 1867?

(Plaintiffs objected, because it has not been shown that there is any such company; and, if there was such a company, they are bound to keep a record which will show for itself; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

Answer. Either 11 or 13. I don't recollect what the lawful number was. It was full, whatever it was.

Q. Were there ever that many acting at one time together in a body during those 2 years?

A. No, sir.

Q. How many of those directors were together at any one time in the years 1866 or 1867?

(Plaintiffs objected as irrelevant; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. I suppose there were together 9 or 10 directors. Certainly as many as 8 frequently.

Q. Where?

A. In the office of the company.

Q. Where was the office of the company?

A. The office of the company in 1866 was at the First National Bank of Leavenworth.

Q. Do you think there were more than 8 together at any one time during those two years?

A. My impression is there were 8 or 9. I don't think there were more than 9.

Q. Are you certain there were not more than 10 together at any one time?

A. I think not. I speak from recollection.

Q. Where is the railroad of the Missouri River Railroad Company?

A. It extends from the State line, near Kansas City, to Leavenworth, in the State of Kansas.

168[51] Q. The first place you mentioned is how far from the mouth of the Kansas River where it enters the Missouri River?

A. I suppose it is about 2 miles.

Q. It does not exceed 3 miles, does it?

A. I don't think it does. I think it was between 2 and 3 miles.

Q. Are you sure it is within 4 miles?

A. Yes, sir; I am pretty certain of that.

Q. Have you been there frequently?

A. Yes, sir.

Q. It commences south of the mouth of the Kansas River?

A. Yes, sir; it commences at the west line of Missouri, south of the Kansas River.

Q. And runs from there through Wyandotte to Leavenworth City?

A. Yes, sir.

Q. It does not extend north of Leavenworth City?

A. Not north of the northern limits of Leavenworth City.

Q. And never did?

A. No, sir.

Q. When was the construction of that road commenced, if yo know?

A. About the 1st of November, 1865.

Q. What did you do with that $160,000 you said you got for the 8,000 acres of land you mentioned as having sold, when you were first on the stand?

(Plaintiffs objected as incompetent and irrelevant; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. I divided it pro rata among my associates in proportion to their interests.

Q. Did you pay any of it to any of the persons, the grantees in this deed? (Showing witness the deed from himself to these plaintiffs.)

A. R. M. Shoemaker is the only name there I paid any of that money to.

Q. You paid some of it to the R. M. Shoemaker named in there?

A. Yes, sir.

P. How much of it did you pay to him?

A. One twenty-sixth—in the neighborhood of $6,000.

Q. When did you make that payment?

A. I think in March, 1868.

Q. Did you pay any of it to John D. Perry?

A. Yes, sir.

Q. How much?

(Plaintiffs objected as incompetent and irrelevant; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. About $6,000—one twenty-sixth of it.

Q. Did you pay any of it to Thos. L. Price you mentioned the other day as being one of your associates?

A. Yes, sir.

Q. How much?

A. One twenty-sixth—about the same sum.

Q. The balance of it you paid around among your associates in proportion to their several interests?

A. Yes, sir.

Cross-examination:

Q. You say that railroad was commenced when?

A. About November, 1865.

Q. When was it completed?

A. The first of July, 1866.

Q. You made it from the State line to Leavenworth?

A. Yes, sir.

Q. How far is this land from that railroad?

(Defendants objected as immaterial, and not a cross-examination; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. The railroad runs across one corner of it.

Q. I mean this land in dispute.

A. I presume that land is 30 miles from the Missouri River Railroad.

Q. Has any of that land been wanted or needed for station-houses or depots for that railroad?

169[52] (Defendants objected as irrelevant and immaterial; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Q. Did you ever pay any of that money to Shoemaker, Miller & Co.?

(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. No, sir.

Q. Had the firm of Shoemaker, Miller & Co. any connection with you or your associates, except in the matter of the purchase of this land?

(Defendants objected as incompetent, irrelevant, immaterial, not a cross-examination, and as calling for the opinion of the witness; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. No, sir.

Q. State whether that money was paid to Mr. Shoemaker on account of Shoemaker, Miller & Co., or to him on his private account, on account of his interest with you as your associate.

(Defendants objected as incompetent, irrelevant, and immaterial, and because it is not a cross-examination, and because it is calling for the opinion of the witness, because it calls for a conclusion of fact and a conclusion of law; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I paid that money to R. M. Shoemaker for his own private account, for his interest with me as one of my associates.

Q. State whether your answer is the same in reference to the money paid to John D. Perry and Thos. L. Price.

(Defendants objected for the same reasons as those last above sated; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. It is the same.

Defendants then again offered in evidence the contract of settlement, dated May 10, 1867, and which is heretofore fully set forth.

(Plaintiffs objected as incompetent, irrelevant, and immaterial; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

Defendants here rested their case.

(Plaintiffs moved to strike out the last paper offered in evidence, as well as all that H. M. Simpson said touching a conversation with R. M. Shoemaker touching this land, and all he said about a conversation with John D. Perry touching this land; which motion was by the court overruled; to which ruling of the court plaintiffs then excepted.)

E. M. BARTHOLOW, being recalled, testified as follows:

Question. Are you the Mr. Bartholow whose name is to this paper? (Showing the contract of settlement.)

A. Yes, sir; that is my signature.

Q. State whether, at the time of signing your name to that, you had any authority from Shoemaker, Miller & Co. in reference to this land in dispute.

(Defendants objected as incompetent and immaterial, and as calling for the expression of an opinion; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. No, sir.

170 53 Q. State if they ever gave you directions to make a settlement in regard to that land.

(Defendants objected because they may have been given in writing, and if so, the writing will show, and because the question is not con-

fined to parol directions, if any; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. None at all, sir.

Q. Did you, at the time of signing this, know of any disputed claim between the parties in regard to this land, or any part of it?

(Defendants objected as immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. None at all.

Q. Did you have any authority from Shoemaker, Miller & Co. of any kind in writing?

(Defendants objected as incompetent; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. No, sir.

Q. Do you know who were the members of the firm of Shoemaker, Miller & Co.?

A. I do not. I know some of them, but not all.

Q. Did any member of the firm ever authorize or direct you to make a settlement in regard to the land, or any part of it?

A. No, sir.

Cross-examination:

Q. Who wrote the words "Union Pacific Railroad Company, E. D., Shoemaker, Miller & Co., J. D. Perry, by E. M. Bartholow? (showing the contract of settlement.)

A. I wrote them all.

Q. When did you write them?

A. I suppose at that date. I don't know further than the paper shows.

Q. You think you wrote them on the 10th of May, 1869?

A. I suppose so, from the paper.

Question by the court:

Q. Who authorized you to sign that paper, if any one?

A. As far as my recollection goes, I was authorized by letter or otherwise. I was acting very often without authority for the railroad company in their business, if it was for their interest. I was authorized to make this settlement by some member of the company. I consulted with them before they went to St. Louis. I think I made the settlement by authority of a letter, or otherwise, from Mr. Perry or the secretary.

Q. What company do you mean?

A. The railroad company.

Q. How came you to sign the names of Shoemaker, Miller & Co.?

A. They being connected with the railroad company in the building of the road, and were probably interested in the settlement some way, I was anxious to include everything that might bear in any way upon it; to clear up everything to avoid a lawsuit.

Q. You had no instructions from any of the firm to sign this paper?

A. Yes, sir; in this way: I was in consultation with Mr. Perry, Mr. Price, and Mr. Simpson, and was from time to time asked to settle or aid in it. When that settlement was made, I think I sent it to St. Louis for approval, and they sent it back. I think the authority was from Mr. Palmer, the secretary. I think he returned it to me.

Q. I understand you to say that no one of the firm of Shoemaker, Miller & Co. gave you authority to make a settlement in reference to

this land. What I want to know is whether any member of that firm gave you authority to sign this paper?

A. Not at all. My authority was assumed, from my acting for the railroad company. They being interested in the railroad, I used their names. They were also interested in the lumber company, whose business were mostly settled in that question.

171 54 Question by defendants:

Q. You did consult with Mr. Perry and Mr. Price?

A. Yes, sir.

Question by plaintiffs:

Q. In that settlement was anything said by any person with reference to the land in controversy?

(Defendants objected as incompetent, irrelevant, and immaterial; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Cross-examination of the witness resumed:

Q. This is your signature here? (showing a deposition.)

A. Yes, sir.

Q. You wrote it?

A. Yes, sir.

Q. You recollect the time of signing it?

A. Yes, sir.

Q. Where were you?

A. In Simpson's bank, in Lawrence. I think I was there examined.

Q. Tell when it was.

A. I don't know further than the dates will show. I don't remember the date.

Q. You recollect of being in the bank of Simpson Brothers about the 21st of October last, and having your deposition taken?

A. Yes, sir.

Q. You went away and came back?

A. Yes, sir.

Q. You signed in one or two places?

A. Yes, sir.

Q. One of the times you were there was this question asked you: "Was any member of the firm of Shoemaker, Miller & Co., or any of the persons present whose names you signed?"

A. I expect it was. I don't recollect a word about it more than this paper says.

Q. Do you recollect answering "I think not, sir?"

A. I probably did. I don't recollect.

Q. Do you remember being asked this question: "When you signed that contract, and all the names of the persons thereto attached in the absence of all of said persons, without the authority of them, or either of them, either at the suggestion of yourself made to yourself so to do, or at the suggestion of some person by them not authorized so to do, did you?"

A. I recollect a similar question.

Q. Do you recollect your answer?

A. No, sir.

Q. Do you recollect that the first words of your answer were "No, sir?"

A. I don't remember.

Q. Do you recollect answering, "I signed the contract either by ver-

bal or written authority by Shoemaker or Perry, or both, but I do not think they expressed particularly the firm's names; but acting for the railroad company as my general business, my impression is that I may have used the names at my own discretion, believing it to be best for the interest of the railroad company?"

A. I think I answered that way.

Q. Do you recollect making that answer?

A. I do not.

Q. Do you recollect this question being asked you: "By what authority did you sign the name of John D. Perry to that contract?"

A. I do not, more than any of the others—that it is there.

Q. The answer I stated to you last, was it a correct answer to the question as asked?

(Plaintiffs objected as immaterial; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. It seems to be, as far as I remember.

Q. What Shoemaker did you refer to?

A. R. M. Shoemaker, in connection with this road.

Q. One of the plaintiffs in the action now on trial?

A. Yes, sir.

Q. What Perry did you mean?

A. John D. Perry.

Q. How did you come to sign the name of Shoemaker, Miller & Co. to this contract?

A. I think I signed it for the purpose of clearing up everything connected with the settlement.

172 [56] Q. It was substantially the same thing?

A. I advised the same thing.

Q. Did not R. M. Shoemaker, when you were talking with him, convey the idea that you should make such a settlement?

A. I don't remember any conversation with him.

Q. You did have conversations with him?

A. I don't remember. I may have done it; I talked very little with him.

Q. Did you with C. S. Greeley?

A. I don't remember that he was there.

Q. Did you not talk with John D. Perry about it?

A. Yes, sir.

Q. You talked about the matter of the settlement?

A. I don't know to what extent. It was not necessary. He would tell me to go on and make such a settlement as I could.

Q. Did Mr. Perry suggest that he thought you should, on behalf of the various other parties besides the Simpsons, make it about the way it was made?

A. I don't know how he said it. In conversations he would tell me to make the best settlement I could. He had been a long time in conversation about it. I don't know what our conversation was. I can't tell.

Q. Would you have signed the name of Shoemaker, Miller & Co. at the time unless, at the time, you regarded yourself as having authority from Shoemaker, Miller & Co., or some member of the firm to do so?

(Plaintiffs objected because it calls for the opinion of the witness, and for other good and sufficient reasons; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. State if you at the time understood the legal effect, so far as forgery is concerned, of signing the name of a party or firm to a paper without authority?

A. I suppose I knew, to a certain extent, what it was to commit forgery. I did not do it with that purpose.

Q. Do you mean to say you had no authority from any member of the firm of Shoemaker, Miller & Co. at the time you signed it?

A. I considered, as a general thing, I had authority in matters connected with the railroad company.

Q. State whether, at the time you signed the name Shoemaker, Miller & Co. to this paper, you understood you did not have authority from that firm or any member of it so to do.

A. No, I could not say that, because I believe if I had it from the railroad company I had it from them, so far as that controversy was concerned.

Q. Why?

A. I was acting in everything for the railroad company; it was a railroad matter, and I considered I had authority to use that name. I was advised to do so.

Q. By whom?

A. I think Judge Usher advised me.

Q. To sign the name of Shoemaker, Miller & Co.?

A. To clear up everything connected with that matter.

Q. Was he a member of the firm of Shoemaker, Miller & Co.?

A. I don't know as he was.

Q. Don't you know he was at that time?

A. I can't say positively.

Q. Have you not heard some of the plaintiffs in this case, before that time or since, say he was a member of that firm?

A. I don't know that I have. He is regarded as a member of the railroad company in a certain way. I don't know how.

Q. State if the firm of R. M. Shoemaker & Co., Shoemaker, Miller & Co., and the Union Pacific Railway Co., E. D., were not, so far as business transactions are concerned, the same thing so far as the action of the plaintiffs in this case is concerned?

(Plaintiffs objected as calling for the opinion of the witness; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

173 [57] A. They are about the same thing in many respects, as I understand it. They were the same in the construction of the road, but the company was independent of the contractors.

Q. Who was Shoemaker, Miller & Co., as connected with the Union Pacific Railway Co., E. D.—what did they do as connected with it?

A. They built a certain part of the road.

Redirect examination:

Q. You were acting as agent of the Union Pacific Railroad?

A. Yes, sir.

Q. This agreement refers to a litigation between the parties then pending?

A. Yes, sir.

Q. Involving special matters referred to in that agreement as the Delaware Lumber Company?

A. The Delaware Lumber Company's matters were some of the principal matters settled in it.

Q. By being authorized by the railroad company you considered you had a right to sign the other names about matters connected with the lumber company?

A. Yes, sir, and the railroad company.

Q. That was all the authority you had?

A. I presume I had other. I don't remember distinctly my authority.

Q. Do you know of a controversy at that time between Shoemaker, Miller & Co. and the Simpsons, or either of them?

(Defendants objected as incompetent; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Q. In the conversations you held with Mr. Perry, or Mr. Price, was any matter of difference spoken of between the Simpsons and Shoemaker, Miller & Co.?

A. Not that I remember, further than stated in the settlement.

Plaintiffs offered in evidence the examination-in-chief, contained in the deposition of R. M. Shoemaker, on file in this case, a copy of which is as follows, to wit:

ROBERT M. SHOEMAKER, of lawful age, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith that—

(Plaintiffs being represented by said R. M. Shoemaker and their attorney, and defendants being also present by their attorney.)

Examination-in-chief:

Q. State your age, residence, occupation, and how employed during the years 1866, 1867, and 1868.

A. I am fifty-four years old. My residence is in Glendale, Hamilton County, Ohio. I am a civil engineer and railroad builder, and have been such since the year 1836. During the years 1866, 1867, and the greater part of 1868, I was engaged in building what is now known as the Kansas Pacific Railroad, in Kansas.

Q. State whether you are one of the plaintiffs in this suit, and what particular position you held for Shoemaker, Miller & Co., the plaintiffs.

A. I am one of the plaintiffs. I was the acting partner and general manager for the contractors, Shoemaker, Miller & Co., in building the road from Fort Riley to Sheridan, in Kansas, and, as such, I had entire control of all their operations while building said road.

174 [58] Q. Were any of these lands referred to in your answer to interrogatory third as purchased by Shoemaker, Miller & Co., afterwards claimed by Simpson, of Lawrence, Kansas, one of the defendants in this suit? If so, when was said claim made, and when were you first advised of their claim?

A. I never held any conversation, that I know of, with either of the defendants about the lands in dispute. Some time in either the last of April or May, eighteen hundred and sixty-seven, I heard that they laid claim to a section of the land purchased from Caldwell.

Q. Have you seen an affidavit or a copy of the affidavit made by William A. Simpson, one of the defendants in this suit, on the sixteenth day of September, eighteen hundred and sixty-nine, attached hereto, marked "A," and made part of this deposition? If so, state whether you, as agent or manager of Shoemaker, Miller & Co., ever authorized and empowered one E. M. Bartholow, or any one else, to release to S. N. Simpson, vendor of the land in dispute, or his assigns, all of the claim which the plaintiffs had at that time against said S. N. Simpson, or his assigns, to the premises in dispute in this action. State also whether the lands in dispute, and referred to in the paper marked

"A," and hereto attached, were conveyed by the Missouri River Railroad Company to S. N. Simpson, or any one else, with your knowledge, consent, or approval.

A. I have seen what purports to be a copy of said affidavit. I never did authorize said E. M. Bartholow, or any one else, to make any such release to said William A. Simpson, or any one else. The story that I did so authorize Bartholow is made out of whole cloth and is entirely untrue. I never was authorized to make any such release. I know, also, that General T. L. Price never had any such authority. I was in my office in Leavenworth all of the eleventh day of May, eighteen hundred and sixty-seven, and am almost positive that I did not see either Mr. Bartholow or General Price on that day. The lands in dispute were not so conveyed to Mr. Simpson with my knowledge, consent, or approval. The lands in dispute were among the most valuable of the whole eight thousand acres bought by Shoemaker, Miller & Co. of Caldwell, and were among the first selected of the purchase. The right of Shoemaker, Miller & Co. to the lands was never released, nor was any release of them ever authorized by me to Mr. Simpson, or any one else.

(Defendants objected to so much of said deposition as is in the words following, to wit, "the lands in dispute were among the most valuable of the whole eight thousand acres bought *of* Shoemaker, Miller & Co. of Caldwell," as being incompetent; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

(Defendants objected to so much of said deposition as is in the words following, to wit, "and were among the first selected of the purchase," as incompetent and irrelevant, and because it should be shown in writing; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

ALEXANDER CALDWELL, being recalled, testified as follows:

Question. Are those the minutes of the Missouri River Railroad Co.?

Answer. Yes, sir.

Q. Have you examined those minutes during the year of its organization and up to July, 1867?

175[59] (Defendants objected because a copy of the minutes has not been furnished according to demand, and as incompetent, irrelevant, and immaterial.

It was admitted that no copy of the minutes referred to has been furnished the defendants.

The objection of the defendants was then by the court overruled; to which ruling of the court defendants then excepted.)

A. Yes, sir.

Q. Were you present at all the meetings of the directors of the company during that time?

A. Yes, sir.

Q. Is there any authority, by resolution or otherwise by the board of directors to L. T. Smith or any one else, to sell lands in behalf of the Missouri River Railroad Company, up to that time?

(Defendants objected as incompetent, irrelevant, and because there has been no copy of any minutes or proceedings furnished the defendants under the demand for copies, and as calling for an expression of opinion by the witness; which objection was by the court sustained to the question in that form; to which ruling of the court plaintiffs then excepted.)

Q. Is there any entry of any resolution or order or action of the

board on the subject of the sale of the lands of the company up to July, 1867?

(Defendants objected for the same reasons as last above set forth; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. There is not.

Q. Were you present at all the meetings of the board of directors up to that time?

A. Yes, sir.

Q. Did the board of directors ever have before them, at any meeting, the subject of prescribing any mode in which the lands of the company should be disposed of?

(Defendants objected as incompetent, irrelevant, and immaterial; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Q. Is there any other record of proceedings of the board of directors of the Missouri River Railroad Company, from its organization up to that time, except the one you have in your hand?

A. This does not go quite up to July, 1867.

Q. When does it go to?

A. To April, 1867.

Q. Where is the other record?

A. The secretary, I suppose, has it.

Q. Have you examined the other book, too?

A. Yes, sir.

Q. Have you examined the records of the Missouri River Railroad Company from its organization to July, 1867, to see if any entry of that kind is anywhere on the record?

(Defendants objected as incompetent and irrelevant, and as calling for an expression of opinion, because there is no showing that the books of the company are in court, and because there has been no copy furnished the defendants under the demand; which objection was by the court sustained until the books are in court; to which ruling of the court plaintiffs then excepted.)

The books were then presented in court.

Q. State if you have examined the record of proceedings of the Missouri River Railroad Company up to July, 1867.

A. I have.

Q. Have you examined them with a view to see if there was any order in those records in reference to the disposition of those lands?

A. Yes, sir.

Q. Is there any order in them with reference to the disposition of those lands within that time?

176[60] (Defendants objected as incompetent and irrelevant, because the books will show for themselves; because there has not been a copy furnished as demanded, and because it calls for the opinion of the witness on the construction of a writing, and because there is no evidence to show, or tending to show, that all the proceedings of that organization or its board of directors have been put in writing; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. No, sir, I find no resolution of that kind.

Q. Is there any such resolution?

(Defendants objected for the same reasons as before; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. There is none.

Q. You stated that you were present at all the meetings of the board of directors that is not reduced to writing in those minutes you have examined?

(Defendants objected as incompetent and irrelevant, and calling for the expression of an opinion; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Q. Were you present at the time this instrument was signed by Mr. Smith and Mr. Simpson? (showing the contract offered in evidence by defendants.)

A. Yes, sir.

Q. State whether any consideration was paid for that deed, or for the other instrument, by Mr. Simpson.

(Defendants objected as incompetent, immaterial, and because it tends to contradict the paper; which objection was the court overruled; to which ruling of the court defendants then excepted.)

A. There was no consideration paid.

Q. State whether the dollar stated in that deed was paid or not.

A. It was not.

Q. State where the talk between Smith and Simpson in regard to that deed first commenced, and all the circumstances attending it.

(Defendants objected as incompetent and immaterial, and because it is merged in the written contract.

Plaintiffs stated that the object was to show that there was no consideration for the agreement. The court then overruled the objection; to which ruling of the court defendants then excepted.)

A. The first place I ever met Mr. Simpson, to know him—probably the first time I ever saw him—was on the 21st day of February, on the Delaware Reserve, near Mr Pratt's, the Indian agent of the Delawares. I saw Mr. Simpson there the evening before the day fixed for the registry of the Indians. Mr. Pratt and Mr. Smith were there. That is the first place I knew of Mr. Smith having any conversation with Mr. Simpson.

Q. State the first conversation you ever heard between them on the subject.

(Defendants objected as incompetent, irrelevant, and immaterial, and because the conversation was merged in the contract; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. We were on the reserve at the time the registry was going on, and found there was a difficulty in having it done. The Indians did not register. There appeared to be some dissatisfaction about it. Simpson was there.

(Defendants objected to the witness stating anything about a registry, because if there was one it was in writing and will show for itself. Upon which objection there was no ruling.)

177[61] Witness resumed:

We found the Indians assembled there, and one of the Johnnycakes told me Mr. Simpson was dissatisfied. I asked why. He said some promise had been made to Mr. Simpson, or he was so informed. That was the first I knew of a promise to Mr. Simpson, and I went to him and asked what the trouble was. He said that Mr. Smith had promised to give him some land, and he did not think he was going to do it.

Q. In what connection was it you asked him what the trouble was; whether it was what the trouble was with the Indians or not?

(Defendants objected for the same reasons as last above set forth, and

because it was hearsay & incompetent; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I knew there was trouble, and learned that it originated with him, why the Indians would not register as we expected they would. He said Mr. Smith had made some promise to him, and he was going to have the land. I said if Mr. Smith had promised him anything, it ought to be carried out. I went to Mr. Smith and he denied having made any promise.

Q. Where had Simpson been up to that time?

(Defendants objected as incompetent, irrelevant, and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. Mr. Simpson had been there the night preceding the day I speak of, and had been with Johnnycake the evening before, and probably during the night. He was on the ground the next day. The registry did not proceed. Mr. Simpson was in the way. He had influence enough with the Indians to stop it. I agreed, and Smith made up his mind to comply with Simpson's demands. Simpson declined to take Smith's word, but wanted a deed. Smith declined to make a deed because he had no title to the land. Simpson said it could be made conditional, so that if he could not get those lands, he could get other lands, but insisted on a deed. Before the obstruction was taken away, he required us to come to Leavenworth and make him a deed.

Q. State what took place in Leavenworth.

(Defendants objected as incompetent, irrelevant, and immaterial, and because all conversations are merged in the contract; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. Mr. Simpson followed us to our office, and there the papers were made out as he dictated.

Q. Were you present at the time those papers were made out?

A. Yes, sir.

Q. The deeds were made out, you say, in your office?

A. Yes, sir.

Q. State whether anything was paid there by Mr. Simpson?

(Defendants objected as immaterial and irrelevant; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Q. Where did you go from your office?

(Defendants objected as above; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. The papers were made out in my office, and it was agreed they should be placed in the First National Bank.

Q. Did you go to the First National Bank?

A. Yes, sir.

Q. Who was there?

A. Judge Crozier and the clerks.

Q. State whether, in the First National Bank, in presence of Judge Crozier, anything was said between the parties as to who should pay for the stamps; if so, what?

178[62] (Defendants objected as irrelevant and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. The deed was prepared, and something was said about putting stamps on it. Simpson refused to buy the stamps. I told him I thought it pretty mean to require me to pay for the stamps when he

was getting the land for nothing. He said he wanted a perfect deed, and wanted it stamped; whereupon I paid six dollars for stamps to put on the deed.

Q. Was anything said by Mr. Smith on that subject?

(Defendants objected as incompetent, irrelevant, and tending to contradict the writing; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. Yes, sir; as near as I can recollect, Smith said, "Damn it, put it on; let the tail go with the hide;" or something of that kind.

Q. Was that in connection with your remark?

(Defendants objected as before; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. Yes, sir.

Q. At what place on the Delaware Reserve did this first commence?

A. I said I first met Mr. Simpson at Mr. Pratt's.

Q. Where is that on the reservation?

A. It is what was called the agency, I think about the center of the reservation.

Q. State whether at that time any registering had been done by the Indians?

(Defendants objected as incompetent, irrelevant and immaterial, because if there was a registry made it will show for itself; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. There was no registry at that time.

Q. State whether any Indians registered till after the deed was made?

(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I don't know whether they did or not. There certainly were none registered till after we agreed to make a deed. I don't think any registered till after the deed was actually made.

Q. State whether the Indians continued to make trouble about registering after that agreement was entered into?

(Defendants objected as immaterial; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Q. Was there any further trouble about the Indians registering after that agreement was entered into?

(Defendants objected as immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. There was none.

Question by the court:

Q. Have you stated all the inducements to the making of the contract in question?

(Defendants objected to the court asking any questions as improper, and because competent counsel represented the plaintiffs, and to the question asked as incompetent; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. The idea I wished to convey was, there was no consideration at all of any kind.

179[63] Direct examination, by plaintiff, resumed:

Q. State whether there was any other inducement of any kind to the making of that deed and contract except what you have stated?

(Defendants objected as incompetent and irrelevant, and because it tends to contradict the writing, and because the plaintiffs had once closed their examination; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. There was none.

ROBERT CROZIER, being duly sworn, testified as follows:

Question. Were you present at the time referred to by Mr. Caldwell, at which Mr. Smith, Mr. Caldwell, and Mr. Simpson came to the First National Bank with this deed and contract?

A. I was.

Q. State what conversation you heard between those parties as to this deed and contract—what they were made for?

(Defendants objected as incompetent, immaterial, and because the conversations in relation to that matter were merged in the written papers, and because any evidence different from the papers would be a contradiction thereof; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I think on the day of the date of these papers Mr. Smith, Mr. Caldwell, and Mr. Simpson came into the First National Bank, bringing with them these two papers and some others. They were acknowledged in the bank before a notary in the bank. Mr. Simpson stated they were to be left with with me to be delivered to Mr. Pratt when he should call for them. After the acknowledgment was taken they asked me to put stamps on them, which I did. After that was done, something was said between Mr. Caldwell and Mr. Simpson about who should pay for the stamps. Mr. Caldwell remarked, substantially, to Mr. Simpson that inasmuch as he got the land without costing him anything he might afford to pay for the stamps that went on it. Mr. Simpson smiled. I don't recollect what he did say, but he declined to pay for the stamps. That was the substance of the conversation. I can't give the language.

Q. What was said by Mr. Smith in that conversation?

(Defendants objected for the reason last above stated; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. Mr. Smith was listening to the conversation. I thought he was in a bad humor; he was walking back and forth, and turned around and said, "Caldwell, pay for the stamps; you might as well let the tail go with the hide." I believe that was his exact expression.

Q. The papers were left with you?

A. Yes, sir; sealed in an envelope.

Q. State whether, when they were thus left with you, anything was said by Mr. Simpson that the deed was to remain there till it was ascertained that the Indians made no farther resistance to registering?

(Defendants objected as incompetent, and upon the objection asked the witnesses as follows:)

Q. State if there was not something written on those papers in relation to that matter.

A. There was something outside on the envelope, as to whom it was to be delivered. I don't think there was anything as to any contingency upon which I should deliver them.

Question by the court upon this point:

Question. Who made the writing?

A. I think some was made by Mr. Caldwell and some by Mr. Simpson, and perhaps I made some.

180[64] Q. Where is it now?

A. I could not tell; I gave it to Mr. Pratt when he called for it.

(The objection of defendants was then by the court sustained; to which ruling of the court plaintiffs then excepted.)

Q. Was there anything said at the time the papers were left with you about the registration of the Indians; if so, what?

(Defendants objected because all that was said was merged in the writing on the papers; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. There was some conversation between Smith, Caldwell, and Simpson about the registry with reference to the delivery of these papers.

(Plaintiff proposed to prove that these papers were to be delivered to Major Pratt after the registry was complete.

Defendants objected as incompetent; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

JOHN G. PRATT, being duly sworn, testified as follows:

Question. Were you agent of the Delaware Indians in February, 1867?

(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I was.

Q. Where was your agency?

A. On the Delaware reservation.

Q. What part of it?

A. On the Diminished Reserve, about the south part of it.

Q. How far from this city?

A. About fifteen miles.

Q. How far from Lawrence?

A. About twenty-five miles.

Q. Did you know S. N. Simpson?

A. I have seen him.

Q. How far were you from the council-house?

A. About a mile and a half.

Q. How far did Sarcoxie live from where you were?

A. About twenty miles.

Q. State whether Sarcoxie lived in the vicinity of the land in dispute in this case?

A. He did.

Q. What Indians lived upon that land?

(Defendants objected as incompetent and immaterial; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Q. Do you remember the time appointed to take the registration of the Delaware Indians under the treaty?

A. I recollect when I was directed to make it.

(Defendands moved to strike out the last answer, because the directions, if any, were in writing and will show for themselves; which motion was by the court overruled; to which ruling of the court defendants then excepted.)

Q. Do you remember the time the Indians were called together for that purpose?

A. Yes, sir.

Q. Were they called together under your direction?

(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. Yes, sir.

181[65] Q. State what white men were there the day the registry was to take place.

(Defendants objected as incompetent, irrelevant, and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. There were Judge Usher, L. T. Smith, Alexander Caldwell, S. N. Simpson, and Mr. Buckley. I don't know his first name. There might have been some others.

Q. State where the registration was commenced on the morning of the day they were called together for that purpose.

(Defendants objected as incompetent, and because if there was a registration it would be in writing, and will show for itself; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. We began it as soon as we could after.

Q. State whether M. Simpson was at your house before the registration commenced.

(Defendants objected as immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. He was there.

Q. State whether there was trouble in the Indians commencing to register that day?

(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. There was an obstruction somewhere. I don't know where it came from.

Q. Did you talk to Simpson about what it was?

A. I did not.

Q. Did the Indians inform you what it was?

A. No, sir.

Q. How long did that obstruction, whatever it was, last?

(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. About one day.

Q. Do you know of Mr. Smith, Mr. Caldwell, and Mr. Simpson coming to Leavenworth?

(Defendants objected as incompetent and irrelevant; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I recollect it.

Q. Did you come with them?

A. No, sir.

Q. State whether that obstruction ceased after they came to Leavenworth, or whether it ceased after they returned from Leavenworth.

(Defendants objected as incompetent and irrelevant; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. It was before they came away.

Q. Did you know anything about the agreement made between Smith and Simpson in regard to this section of land?

A. No, sir.

Q. Had you often seen Mr. Simpson there before?

A. Yes, sir.

Q. State how frequently.

(Defendants objected as immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. He was frequently there.

182[66] Q. Did you know what the nature of his business was when on the reservation before?

(Defendants objected as immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I did not ask him his business, and he did not tell me. I can't say I know what his business was.

Q. Do you know whether he was in the habit of dealing with the Indians, or having intercourse with them of any kind?

(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. He had been in the habit of dealing with some of them.

Q. Which ones specially?

A. I don't know that I could say.

Q. State what, if any, knowledge you have as to whether he was intimate with the chiefs of the tribe or not.

(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I think he was familiar with all of them.

Q. State whether, if you know, he was with Johnnycake, or any of the other chiefs, the night before the registration was to take place.

(Defendants objected as incompetent, irrelevant, and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. He was with him the day before.

Q. Did you know W'm A. Simpson?

A. Yes, sir.

Q. State whether he was on the reservation among the Indians near that time, if you know.

(Defendants objected as incompetent, irrelevant, and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I did not see him or know he was there.

Q. Do you know whether he was acquainted with these Delaware chiefs, and was familiar with them at that time or not?

(Defendants objected as incompetent, irrelevant, and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I think he knew them well.

Q. You received those papers from the First National Bank, did you?

(Defendants objected as immaterial and irrelevant; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I received a package from Judge Crozier at the First National Bank.

Q. What has become of the envelope that was on that package?
A. I guess it went into the waste-basket.
Q. Do you know that fact?
A. I don't know it. It might be in existence. I don't know.
Q. Did you take it off yourself?
A. Yes, sir.
Q. Did you leave it at the bank, or take it away with you?
A. I took it away with me.
Q. Can you state whether that envelope was preserved or not?
A. I don't think it was. I don't recollect about it.
Q. If it was preserved it is in your house?
A. Yes, sir.
183 67 Q. Do you file such papers as that in your house?
A. I would not file an envelope.
Q. If it was not filed it would not be in your house, would it?
A. I don't think it would.
Q. State whether you are satisfied it is in existence or not?
(Defendants objected as incompetent; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)
Q. What is your practice?
A. I don't regard envelopes as of any value unless I had some directions about it. I had none about that, and it is gone.
Q. Have you seen that envelope since?
A. I did while the papers were on hand, keep them in it. When they were all gone I paid no more attention to it.
Q. Are you sure you retained the envelope?
A. Yes, sir.
Q. How long ago was that?
A. It was in May, 1867, and during the summer of that year.
Q. State whether, at the time the registration was to take place, you invited Mr. Caldwell and Mr. Smith to be there or not?
(Defendants objected as incompetent and immaterial; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)
Q. State whether you invited S. N. Simpson to be there?
(Defendants objected as incompetent and immaterial; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)
Q. State whether you knew that S. N. Simpson was going to be there at that time?
(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)
A. I did not.
Q. State whether he had any business with the agency at that time?
(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)
A. I don't know what business he had. He had none with me, nor with the Indians so far I was concerned.
Q. Was there any person there but you that a person could have business at the agency with?
(Defendants objected as incompetent and immaterial; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)
Q. Who was acting as agent of the Delawares at that time between the Government and the Indians?

(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I was.

Q. Was any other person?

A. Not that I know of.

Q. How long after that time was it you called for those papers on Judge Crozier?

(Defendants objected as immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.

A. I think it was in the first days of May.

184 68 Q. Did you get the papers when you first called for them?

A. Yes, sir.

Q. Do you know whether it was after the registration was completed or not?

A. It was after.

Q. Do you remember what time in May it was?

A. I think it must have been as early as the 10th of May. I can't recollect the time.

Q. Did you go there at that time by the direction of Mr. Simpson?

(Defendants objected as incompetent, and as calling for the opinion of the witness; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I did not.

Q. At the time Mr. Simpson was there, at the time the registration was about to take place, did you have a talk with him on the subject of the registration, or about his getting the land?

(Defendants objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I did not.

Q. Did you have a talk with the Indians about what the trouble was?

(Defendants objected as incompetent and immaterial; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Cross-examination:

Q. You live on a piece of land in Wyandotte County, do you not?

(Plaintiffs objected as incompetent; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. I do.

Q. You were living there at the time you speak of, were you?

(Plaintiffs objected as immaterial and irrelevant; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. I was.

Q. Is there a section of land adjoining that enclosed and occupied by yourself?

(Plaintiffs objected as immaterial and incompetent; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. There is part of a section.

Q. How large a part?

A. Probably one-half.

Q. You claim to own that, do you not?

(Plaintiffs objected as immaterial; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. I do.

Q. State whether Mr. Smith and Mr. Caldwell promised to give you that land if you would help get the treaty through, and help get the Indians to register?

(Plaintiffs objected as incompetent and immaterial; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. They did not.

Q. Did you give anything for that land?

(Plaintiffs objected as immaterial; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. Have you given any consideration for any part of that section?

185[69] (Plaintiffs objected as incompetent and immaterial; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. Did you ever have a conversation about that time with Mr. Caldwell in relation to his giving you a section, or any piece of land, if you would assist in getting the Indians to register?

A. I never did.

Q. Was there any conversation in relation to your assisting in getting the Indians to make the treaty with the Government?

A. There never was.

Q. What, if anything, have you ever given for that part of a section you referred to?

(Plaintiffs objected as irrelevant and incompetent; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. Was there a conversation between you and L. T. Smith, about the time of the registry, that you should have that section of land, or any part of it?

A. No, sir.

Q. Had there been before?

A. No, sir.

Q. Had there been a conversation between you and L. T. Smith in which he said you should have a tract of land—in a conversation had previous to the time you speak of when those parties were there?

A. If I understand the question, it was land I was to receive in consideration of assisting to perfect the arrangements with the Indians. I might have talked with him about land; about getting it or not getting it. I don't recollect, as I talk with a great many persons about land.

Q. Had not Mr. Smith promised you a piece of what was then known as the Delaware Reservation?

A. No, sir.

Q. Had Mr. Caldwell?

A. No, sir.

Q. Do you know H. M. Simpson?

A. Yes, sir.

Q. Have you not said to him you did not know whether Mr. Caldwell would carry out his agreement with you about land, as it was not in writing?

A. I have no recollection of it.

Q. Have you had a conversation with S. N. Simpson on that subject?

(Plaintiffs objected as incompetent and irrelevant; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. State if you did not have a talk with Judge Usher before the time

of the registry about having part of the Diminished Delaware Reserve, and he said part of it should be given to you, he purporting to act in behalf of parties interested in the reserve.

A. I had many conversations with parties in regard to land.

Q. Did you not get other papers at the same time with these?

A. I got the package left with Judge Crozier.

Q. How many papers did you get with writing on them?

A. I don't recollect.

B. Was there not four or five?

A. I think there were.

Q. Did you not deliver one of them to Charles Johnnycake, one of those Delaware Indians?

A. I did.

Q. You got it in the same package?

A. Yes, sir.

Q. Did you not give another one to Isaac Johnnycake?

A. I did.

Q. Was he one of those Delaware Indians?

A. He was a Delaware Indian.

Q. Was he not one of those about the agency the day you speak of?

A. Yes, sir.

Q. What position did Charles Johnnycake occupy in the nation at that time?

A. He was one of the chiefs.

Q. Head chief?

A. No, sir.

Q. What position did Isaac Johnnycake occupy?

A. He was interpreter for the nation.

Q. This place you speak of, where Simpson and Caldwell were, was it on the Diminished Reserve, or on your own land?

A. We were at different places; sometimes at the council-house and sometimes at my house

1867 Q. Your house was not on the Delaware Diminished Reserve, was it?

A. It was on my own land.

Q. It was no part of the Delaware Reserve at that time, was it?

A. I can't say that. I don't know whether it would be called so or not. It was geographically there.

Q. It was your own land, was it not?

A. I called it so.

Q. You still use it as you did then?

A. Yes, sir.

Q. You have not bought it of any one in the mean time?

A. I have not.

Q. You are occupying it?

A. Yes, sir.

Q. Was it not enclosed then?

A. Yes, sir.

Q. It was part of the land the Government had conveyed to you before that time, was it?

A. Yes, sir.

Redirect examination:

Q. You have been asked certain questions in reference to the obstructions. Did you say or do anything to effect that registration?

(Defendants objected as incompetent, irrelevant, and calling for an

opinion; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I did not.

Q. State whether you made all the efforts you could to have it proceed before the time those men came to Leavenworth.

(Defendants objected as incompetent, irrelevant, and calling for an opinion; which objection was by the court overruled; to which ruling of the court defendants then excepted.)

A. I tried to do so.

Q. Had you made a demand or request on those parties to do anything for you in consideration of your doing that?

A. I don't recollect of doing so.

Q. Was there any of them refused registering up to the time Mr. Simpson came there the day before?

(Defendants objected as incompetent, immaterial, and calling for an opinion; which objection was by the court sustained; to which ruling of the court plaintiffs then excepted.)

Plaintiffs offered in evidence a certified copy of the certificate of organization of the Missouri River Railroad Company.

(Defendants objected as incompetent, irrelevant, and immaterial, and because a copy has not been furnished as demanded.)

Plaintiffs stated it was offered for the purpose of showing the company acted under the statute of 1865.

The court stated that it would be received, not for the purpose of showing there was no such corporation, but for the purpose of showing under what law they were acting.

(To which ruling of the court defendants then excepted.)

Said paper was then read in evidence, a copy of which paper is as follows, to wit:

Articles of association of the Missouri River Railroad Company.

The undersigned have formed an association for the purpose of constructing a railroad as hereinafter specified, and have adopted and assumed to themselves the name "MISSOURI RIVER RAILROAD COMPANY." The names and residence of the persons forming this association are as follows: A. M. Clark, G. J. Park, E. H. Marsh, John Wilson, W. C. Lobenstein, C. N. Palmer, John F. Richards, Charles S. Stet-
187[1] tauer, James B. Laing, and Josiah Kellogg, all of the city and county of Leavenworth, Kansas.

This company designs and is formed for the purpose of constructing a railroad commencing on the line between the State of Missouri and the State of Kansas, at the terminus of the Missouri Pacific Railroad, thence along or near the Missouri River to the city of Leavenworth, thence to Fort Leavenworth, Kansas.

The capital stock of said company shall be two hundred thousand dollars.

Witness our hands this seventeenth day of February, A. D. 1865.

A. M. CLARK.
G. J. PARK.
E. H. MARSH.
JOHN WILSON.
W. C. LOBENSTEIN.
C. N. PALMER.
JOHN F. RICHARDS.
C. S. STETTAUER.
JAMES B. LAING.
JOSIAH KELLOGG.

STATE OF KANSAS,
County of Leavenworth:

Be it remembered that on this seventeenth day of February, A. D. 1865, before the undersigned, a notary public within and for the county and State aforesaid, personally came A. M. Clark, G. J. Park, E. H. Marsh, John Wilson, W. C. Lobenstein, C. N. Palmer, John F. Richards, James B. Laing, Charles S. Stettauer, and Josiah Kellogg, who are personally known to me to be the identical persons whose names are affixed to the foregoing instrument of writing, as parties thereto, and severally acknowledged the same to be their own act and deed.

In testimony whereof I have hereto set my hand and affixed my official seal, at office in Leavenworth City, this 17th day of February, 1865.

[NOTARY SEAL.] W'M MCNEILL CLOUGH,
Notary Public.

STATE OF KANSAS,
County of Leavenworth:

John Wilson, J. B. Laing, and John F. Richards, members of the above and foregoing association and company, being first duly sworn, depose and say that the foregoing statements for the purpose of the association and incorporation of the Missouri River Railroad Company, are true, and that the objects and purposes of said company are truly set forth in the above statements.

Sworn to before me, and subscribed in my presence, by the said John Wilson, James B. Laing, and John F. Richards, this 17th of February, A. D. 1865.

[NOTARY SEAL.] W'M MCNEILL CLOUGH,
Notary Public.

(Signed) JOHN WILSON.
J. B. LAING.
J. F. RICHARDS.

I, R. A. Barker, secretary of state, do hereby certify that the above is a true and correct copy of the original on file in my office.

In testimony whereof I have hereto set my hand and affixed the seal of my office this 20th day of February, A. D. 1865.

[SEAL.] R. A. BARKER,
Secretary of State.

188[72] ROBERT CROZIER, being recalled, testified as follows:

Question. State whether you are or were a director in that corporation.

Answer. Yes, sir.

Q. Please examine these books, and state if they are the records of that supposed corporation.

A. They are.

Q. Are there any other books of record?

A. I think not; no other books which contain the minutes of the proceedings of the board of directors.

In connection with this testimony and that of Mr. Caldwell, the books of the company were tendered to the defendants to make such use of as they can in reference to the question of authority.

Defendants' attorneys stated they had the small book from about the time the court adjourned last night till a few minutes before the court met this morning, and the large one from about 8 o'clock last night till a few minutes before court met this morning; but they are too large to

digest in such short time, without referring to other papers which have not been furnished.

Q. Who was the treasurer of that company from 1866 up to this time?

A. I can't tell when Mr Scott was elected treasurer. He is the present treasurer, and has been since about the 1st of January, 1867.

Plaintiffs then offered in evidence the record of what they claimed are the proceedings of the company up to and including the meeting of May 25, 1865, to and including the signature "T. A. Hurd, notary public," for the purpose of showing the organization was under the paper read in evidence. A copy of which record is as follows, to wit:

Proceedings of the corporators of the Missouri River Railroad Company.

A certified copy of the articles of association, filed at Topeka, having been received, the following-named persons, corporators, met at the city engineer's office, in the city of Leavenworth, on the 24th day of February, 1865, to wit: Ja's B. Laing, G. J. Park, C. W. Palmer, Cha's S. Stettauer, John Wilson, W'm C. Lobenstein, John F. Richards.

On motion, Dr. G. J. Park was chosen president, and John F. Richards was chosen secretary.

On motion of John Wilson,

It is ordered, that books for the subscription of stock to this company be opened at the city engineer's office, in this city, on Monday, March 27, 1865, and continue open until $200,000 of stock is subscribed.

The secretary was ordered to give notice of the time and place of opening books through the morning papers of the city, and to procure the necessary books and have same at the time and place appointed.

On motion the meeting of the corporators adjourned.

G. J. PARK, *President.*

JOHN F. RICHARDS, *Secretary.*

RAILROAD NOTICE.—In accordance with the requirements of the general railroad law, notice is hereby given that the books for the subscription of stock to the Missouri River Railroad Company will be opened at the city engineer's office, in this city, on Monday, March 27, 1865, and remain open till two hundred thousand dollars of stock is subscribed.

By order of the corporators.

J. F. RICHARDS, *Secretary.*

LEAVENWORTH, *February* 24, 1865.

189 73 MARCH 4, 1865.

The notice published and signed by J. F. Richards, as secretary, being deemed not sufficient notice,

It is hereby ordered by the corporators that the following notice be published, and that books be opened in accordance therewith:

RAILROAD NOTICE.—In accordance with the requirements of the general railroad law, notice is hereby given that books for the subscription of stock to the Missouri River Railroad Company will be opened at

the city engineer's office, in this city, on Thursday, April 6, 1865, and remain open till two hundred thousand dollars of stock is subscribed.

Leavenworth, March 4, 1865.

G. J. PARK,
JOHN WILSON,
C. S. STETTAUER,
W. C. LOBENSTEIN,
A. M. CLARK,
JOHN F. RICHARDS,
C. N. PALMER,
E. H. MARSH,
Corporators.

RAILROAD NOTICE.—In accordance with the requirements of the general railroad law, notice is hereby given that books for the subscription of stock to the Missouri River Railroad Company will be opened at the city engineer's office, in this city, on Thursday, April 6, 1865, and remain open till two hundred thousand dollars of stock is subscribed.

Leavenworth, March 4, 1865.

JAMES B. LAING,
W. C. LOBENSTEIN,
JOHN WILSON,
A. M. CLARK,
C. N. PALMER,
J. F. RICHARDS,
S. C. STETTAUER,
JOSIAH KELLOGG,
E. H. MARSH,
Corporators.

STATE OF KANSAS, *County of Leavenworth:*

Peter H. Hubbell makes oath that he is proprietor of the Leavenworth Times, a newspaper printed in said county; that the notice, of which the annexed is a true copy, was for thirty consecutive days published in said newspaper, beginning on the 4th day of March, A. D. 1865.

P. H. HUBBELL.

Subscribed in my presence and sworn to before me this fifth day of April, A. D. 1865.

ROB'T H. HOWSLEY,
Notary Public.

190[74] *Books for the subscription of stock to the "Missouri River Railroad Company," opened at the city engineer's office, in Leavenworth, Kansas, on Thursday, April 6, A. D. 1865.*

We, the subscribers, agree to take the number of shares opposite our names in said railroad company.

Date.	Subscribers' names.	Am't paid.	No. sh.	Am't sub.
April 6	A. Macaulay	$46 00	23	$2,300 00
" 6	Henry Foote	40 00	20	2,000 00
" 6	D. R. Anthony	40 00	20	2,000 00
" 6	Wilson, Brace & Co.	40 00	20	2,000 00
Dup. rc't.	Eddy & Arnold	40 00	20	2,000 00
April 6	W. C. Lobenstein	40 00	20	2,000 00
" 6	Thomas C. Stevens	100 00	50	5,000 00
" 6	Thos. Carney	100 00	50	5,000 00
" 6	L. T. Smith	100 00	50	5,000 00
Dup. rc't.	Wm. P. Borland	10 00	5	500 00
April 6	Charles S. Stettauer	50 00	25	2,500 00
" 6	John F. Richards	20 00	10	1,000 00
" 7	James Davis	20 00	10	1,000 00
" 7	J. C. Stone	40 00	20	2,000 00
" 7	A. Caldwell	40 00	20	2,000 00
" 7	E. M. Marsh	20 00	10	1,000 00
" 7	John C. Douglass	20 00	10	1,000 00
" 7	James McGrew	2 00	1	100 00
" 7	E. H. Gruber	100 00	50	5,000 00
" 7	Lucien Scott	100 00	50	5,000 00
" 7	C. Glick	2 00	1	100 00

NOTICE.—In accordance with a resolution of the board of directors, adopted June 20, 1865, notice is hereby given that the certificates of stock in the Missouri River Railroad Company are now ready for delivery, on payment of the balance due. Parties who have subscribed are notified to make payment for same to E. H. Gruber, treasurer, at the banking-house of E. H. Gruber & Co., on or before Saturday, December 23, 1865.

J. F. RICHARDS, *Secretary.*

LEAVENWORTH, *December* 16, 1865.

Notice mailed to each subscriber December 18, 1865.

191[75] *Notice of the meeting of the stockholders of the Missouri River Railroad Company.*

Notice is hereby given that a meeting of the stockholders of the Missouri River Railroad Company will be held at the office of the city engineer, in the city of Leavenworth, on Monday, May 8th, A. D. 1865, at 10 o'clock a. m., for the purpose of choosing eleven directors of said company, and the transaction of such other business as may come up.

JOHN F. RICHARDS.
J. B. LAING.
A. M. CLARK.
W. C. LOBENSTEIN.
JOHN WILSON.
C. N. PALMER.
C. S. STETTAUER.
G. J. PARK.
E. H. MARSH.
JOSIAH KELLOGG.

LEAVENWORTH, KANSAS, *April* 6, 1865.

STATE OF KANSAS, *County of Leavenworth:*

Peter H. Hubbell makes oath that he is the proprietor of the Leavenworth Times, a newspaper printed in said county; that the notice of

which the annexed is a true copy, was for thirty consecutive days published in said newspaper, beginning on the 7th day of April, A. D. 1865.

P. H. HUBBELL.

Subscribed in my presence and sworn to before me this 8th day of May, A. D. 1865.

ROB'T H. HOWSLEY,
Notary Public.

A meeting of the corporators of the Missouri River Railroad Company was held this day, Monday, May 8, 1865, at the city engineer's office, in the city of Leavenworth, Kansas, for the purpose of choosing eleven directors, in accordance with previous notice.

The following persons (corporators) were present: Ja's B. Laing, C. N. Palmer, John Wilson, C. S. Stettauer, J. F. Richards, E. H. Marsh.

On motion, J. B. Laing was elected as chairman, and J. F. Richards secretary of board of corporators, and John Wilson, C. N. Palmer, and C. S. Stettauer were appointed inspectors of election.

192[76] 1865, May 8. The election for directors was then held and resulted as follows:

Names.	Votes.														Total.
L. T. Smith	50	25	20	10	....	23	20	20	10	50	20	10	20	100	378
T. C. Stevens	50	25	20	....	50	....	20	....	10	50	....	....	....	100	325
J. F. Richards	50	25	20	10	50	23	20	....	10	50	....	10	20	100	388
E. H. Gruber	50	25	20	10	50	23	20	20	10	....	20	10	20	100	378
C. B. Brace	50	25	20	10	50	....	20	20	10	50	20	....	....	100	375
J. C. Stone	50	....	....	10	60	....	20	....	....	....	20	....	....	100	250
A. Macaulay	50	25	20	10	50	....	20	20	10	50	20	10	....	100	385
Geo. A. Eddy	50	....	....	....	....	....	....	....	10	....	20	....	....	....	80
Cha's S. Stettauer	50	25	20	10	50	23	20	20	10	50	20	10	20	100	428
Cha's Glick	50	25	20	10	50	23	20	20	10	50	20	....	....	100	398
D. E. Anthony	50	....	....	10	....	23	....	20	....	50	....	10	....	.....	163
Henry Foote	....	....	....	....	....	....	....	....	....	....	20	....	....	.....	20
Lucien Scott	....	25	20	10	50	....	20	20	10	50	20	....	20	100	345
E. H. Marsh	....	25	20	10	50	23	20	20	....	50	20	10	20	100	368
Tho's Carney	....	....	....	....	....	23	....	....	....	....	....	10	20	.....	53
John Wilson	....	....	....	....	....	23	....	....	10	....	....	10	20	.....	63
John C. Douglass	....	....	....	....	50	....	....	....	....	50	....	10	20	.....	130
John Kerr	....	....	....	....	....	....	....	....	....	....	....	10	....	.....	10
W. C. Lobenstein	....	....	....	....	....	23	....	20	....	....	....	....	20	.....	63
C. N. Palmer	....	25	....	....	....	....	....	....	....	....	....	....	20	.....	45

Messrs. L. T. Smith, T. C. Stevens, E. H. Gruber, John F. Richards, C. B. Brace, J. C. Stone, A. Macaulay, C. S. Stettauer, Cha's Glick, Lucien Scott, and E. H. Marsh having received a majority of all the votes cast were declared duly elected as directors of the Missouri River Railroad Company.

193[77] The first meeting of the board of directors was appointed to take place this day, May 8th, A. D. 1865, at the city engineer's office, in the city of Leavenworth, Kansas.

The meeting of the corporators then adjourned.

J. B. LAING, *Chairman.*
JOHN WILSON,
C. N. PALMER,
C. S. STETTAUER,
Inspectors of Election.

JOHN F. RICHARDS,
Secretary Board Corporators.

STATE OF KANSAS,
County of Leavenworth, ss:

Be it remembered that on this the 8th day of May, A. D. 1865, personally appeared before me the undersigned, a notary public within and

for the county and State aforesaid, Leonard T. Smith, E. H. Marsh, Lucien Scott, E. H. Gruber, C. B. Brace, John F. Richards, Jas. C Stone, and Tho's C. Stevens, directors of the Missouri River Railroad Company, and were by me severally sworn to faithfully discharge their duties as such directors.

In testimony whereof I have hereunto subscribed my name and affixed my official seal the day and date above written.

[SEAL.] A. MACAULAY,
Notary Public.

I certify that Aulay Macaulay was this day duly sworn before me, a justice of the peace of Leavenworth County, to faithfully discharge the duties of director of the Missouri River Railroad Company, this 9th May, A. D. 1865.

R. R. REES, *J. P.*

LEAVENWORTH, *May* 8, 1865.

The board of directors of the Missouri River Railroad Company met this day in pursuance of notice from the corporators. The following persons (directors) were present: Messrs. L. T. Smith, A. Macaulay, E. H. Gruber, Lucien Scott, E. H. Marsh, John F. Richards.

The board effected a temporary organization by electing E. H. Marsh president pro tem., and E. H. Gruber secretary pro tem.

On motion, an election for permanent officers was held, and the following gentlemen were unanimously elected officers of this company:

Leonard T. Smith, president; E. H. Gruber, treasurer; Tho's C. Stevens, vice-president; John F. Richards, secretary.

E. H. MARSH,
President pro tem.

E. H. GRUBER,
Secretary pro tem.

The board of directors being organized, and the following directors present, to wit, L. T. Smith, president; E. H. Gruber, E. H. Marsh, C. B. Brace, Lucien Scott, A. Macaulay, and John F. Richards, proceeded to the transaction of business.

On motion, Messrs. L. Scott, A. Macaulay, and E. H. Marsh were appointed a committee on by-laws for the government of the board.

On motion of C. B. Brace, Mr. T. A. Hurd was appointed attorney of this company.

On motion of L. Scott, Mr. W. P. Gambell was appointed associate attorney and counsellor.

Leavenworth, May 8, 1865.

JOHN F. RICHABDS,
Secretary.

194[78] STATE OF KANSAS,
Leavenworth County, ss:

Charles S. Stettauer, being by me first duly sworn, doth say that he is one of the directors of the Missouri River Railroad Company, and that he will faithfully discharge and perform his duty as a director of such railroad company.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 25th day of May, 1865.

T. A. HURD,
Notary Public.

(Said defendants then objected to the same being received or read in evidence because the same was incompetent, immaterial, & irrelevant.

Defendants then specially objected to the record being received in evidence for that purpose alone, but insisted that if they were received in evidence it should be received for all purposes.

Upon which objection there was no ruling of the court. But the court overruled the objection to its being read, & said plaintiffs then read the same, that is, so much of said record as is above copied in evidence, & they there rested their case.)

S. M. SIMPSON, being recalled, testified as follows:

Question. State whether you advised or kept any of the Delaware Indians from registering at any time?

(Plaintiffs objected as incompetent; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

Answer. I did not.

Q. Did you ever advise any of them not to register?

A. I never did.

Q. State whether you saw Mr. Caldwell in Lawrence at any time in the summer of 1867.

A. I did.

Q. State whether you had received the contract and deed to you, mentioned in evidence, from Mr. Pratt previous to that time.

A. I had.

Q. State whether you then said anything to Mr. Caldwell on the subject; if so, state what, and what he said to you.

(Plaintiffs objected as not rebuttal, and as immaterial and incompetent; which objection was by the court sustained; to which ruling of the court defendants then excepted.)

Q. State when Mr. Pratt handed you the paper, called a deed, from the railroad company to you for the land in controversy, and the other paper, called a contract, signed by you and Mr. Caldwell and Mr. Smith?

A. He handed me those papers, I think, in May, 1867.

Q. State whether they were handed to you on the 21st of February, 1867?

A. They were.

Q. Mr. Pratt handed them to you again in May, 1867?

A. Yes, sir.

Q. Did you tell Mr. Caldwell at any time after that that Mr. Pratt had handed them to you; if so, when?

(Plaintiffs objected as incompetent and irrelevant; which objection was by the court overruled; to which ruling of the court plaintiffs then excepted.)

A. It was in the summer of 1867, after Mr. Pratt handed them to me. I think it was in June, and also later than that.

Q. What did you say to Mr. Caldwell on the subject the first time?

A. Mr. Caldwell asked me if I had got them. I told him Mr. Pratt had delivered them to me.

Q. What did Mr. Caldwell say to that?

A. He said, "all right."

195[79] Cross-examination:

Question. It was in June you had that conversation with him, or later?

A. I think it was in June. It was after I got the papers, because he asked me if I had got them, and I told him I had; and he said that was all right.

Question by the court:

Q. You say you got two papers in May from Mr. Pratt; about what time, as near as you can get at it?

A. I don't really know.

Q. About how long before the deed to your brother was it you got those papers from Mr. Pratt?

A. The number of days it is hard to tell. It might have been early in May, or later; I can't tell. I don't recollect.

It was agreed and understood between the parties, plaintiffs & defendants, that nothing in the deposition of R. M. Shoemaker was read showing any selection of lands. And that if any such matter or part thereof had been read it should be considered as though not read in evidence.

The testimony here closed, and the above and foregoing is all the testimony and all the evidence heard, offered, given, or received on the trial of the first above-entitled action, except that the record of the deed dated of the 21st of February, 1867, above mentioned, is not herein-above set forth, but the copy of said record above herein set forth is a copy thereof, as the same appears of record in the records of the office of register of deeds of said county of Leavenworth, as the same was shown to the court when said record was offered in evidence as above shown; and from the minutes on said record, said deed appears to have been recorded in said office of said register of deeds on the 24th day of May, A. D. 1867.

196 And then, when the evidence had been heard and given as aforesaid, said defendants requested said court, the above-named district court of Leavenworth County, Kansas, to state in writing the conclusiont of fact found separately from the conclusions of law; and afterwards, at said September term thereof, A. D. 1870, said court made & stated the conclusions of fact found by it in the said action, and also its conclusions of law separately and severally; then, at the time when made, said defendants, and each of them, excepted of which said conclusions of fact and conclusions of law and of the entry of exceptions thereto, as entered of record in the journals of said court, and of a recital on the journal of said court and the names of the parties to said action, as the same, with and immediately preceding the several conclusions aforesaid, are written & now appear on the journal of said court. The following is a copy, to wit:

197 C. S. GREELEY, S. M. EDGELL, W'M M. McPHERSON, Robert E. Carr, Edward Miller, Mathew Baird, R. M. Shoemaker, J. W. Kenney, partners, as Shoemaker, Miller & Co., plaintiffs.

vs.

W'M A. SIMPSON, DAVID ACKERS, W'M R. Smith, Geo. Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, J. H. Cochran, defendants.

The court having had this cause under advisement and duly considered the same, now here, by request of the parties hereto, & on consideration of the evidence, finds and states its conclusions of fact separately from its conclusions of law, as follows:

As conclusions of fact—

1st. On the 26th day of October, 1867, the United States issued and delivered to Alexander Caldwell a patent for 92,598 $\frac{33}{100}$ acres of
198 land, including the lands in controversy in this suit, which patented lands are the lands authorized to be sold by the provisions of the treaty concluded July 4th, 1866, between the said United States & the Deleware tribe of Indians, and which patent was duly recorded in the office of the register deeds for the county of Leavenworth, in this State, on the 1st day of April, 1868, and omitting only the description of lands therein mentioned, is as follows:

"Whereas by the second article of the treaty concluded on the 4th day of July, 1866, between the United States and the Deleware tribe of Indians, as ratified on the 10th day of August, 1866, the Secretary of the Interior is "authorized to sell to the Missouri River Railroad Company, or to other responsible party or parties, in a body," all that part of the Deleware Indian Reservation, in the State of Kansas, not heretofore sold to the Leavenworth, Pawnee & Western Railroad Com-
199 pany, "being the lands conveyed to said Deleware Indians in pursuance of the provisions of the supplemental treaty of September twenty-fourth, eighteen hundred & twenty-nine, and all other lands owned by the said tribe in the State of Kansas, not previously disposed of, except as thereinafter provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements.

"And whereas it appears from a return, dated October 17th, 1867, from the Secretary of the Interior to the Commissioner of the General Land-Office, that the "Missouri River Railroad Company has, through its assignee, Alexander Caldwell, complied with the terms & conditions of the contract made by the company with the late Secretary of the Interior, Hon. James Harlan, for the purchase of the Deleware Diminished Reserve in Kansas, under the provisions of the "aforesaid treaty concluded with the Deleware Indians, July 4th, 1866," said return being accompanied by a "list of lands within the Deleware Di-
200 minished Reserve, to be conveyed by patent to the Missouri River Railroad Company or its assigns.

"And whereas the said list has been approved by the Secretary of the Interior, with directions to the Commissioner of the General Land-Office 'to cause a patent to be issued in favor of Alexander Caldwell, assignee of the Missouri River Railroad Company, for the lands described therein, containing in the aggregate ninety-two thousand five hundred and ninety-eight acres and thirty-three hundredths of an acre, situated south of the base line and east of the sixth principle meridian in Kansas, and being described as follows, to wit:

(Here follows a description of the lands.)

"Now, know ye, that the United States of America, in consideration of the premises and pursuant to the treaty, the approval, and order aforesaid, have given and granted, and by these presents do give
201 and grant, unto Alexander Caldwell, assignee of the Missouri River Railroad Company, and to his heirs, the tracts of land above described; to have and to hold the said tracts with the appurtenances unto the said Alexander Caldwell, assignee of the Missouri River Railroad Company, and to his heirs and assigns forever.

"In testimony whereof I, Andrew Johnson, President of the United States, have caused these letters to be made patent and the seal of the General Land-Office to be hereunto affixed.

"Given under my hand at the city of Washington, this twenty-sixth day of October, in the year of our Lord one thousand eight hundred &

sixty-seven, and of the Independence of the United States the ninety-second.

[L. S.] "ANDREW JOHNSON.

"By the President:

"By FRANK COWAN, *Secretary.*

"J. N. GRANGER,

"*Recorder of the General Land-Office.*

Recorded vol. 12, pages 321 to 337."

2nd. Said railroad company did not pay for said lands or any part thereof, but said Caldwell did pay for all of said lands, and the improvements thereon, about ten days before said patent was issued, and the money to pay therefor was furnished by said Caldwell and his associates, and by some of them furnished in the following proportions, to wit: By said Caldwell, one-thirteenth and one-third of a thirteenth; by Leonard P. Smith, two-thirteenths and one-third of one-thirteenth; by Lucien Scott, one-thirteenth; by Thomas A. Scott, one-thirteenth; by O. A. Hart, one-fourth of three-thirteenths; by C. H. Peck, one-fourth of three-thirteenths; by George R. Taylor, one-fourth of three-thirteenths; by Daniel R. Garrison, one-fourth of three-thirteenths; by M. H. Insley, one-thirteenth; by John D. Perry, one-twenty-sixth; and by Thomas
203 L. Price, one-twenty-sixth; and by R. M. Shoemaker, one-twenty-sixth. George Partridge, of St. Louis, and James Duffy, of Pennsylvania, were also shareholders. There were thirteen shares in all.

3d. Of the parties who furnished the money as aforesaid, with which to pay for said lands, the following were officers and directors of said railroad company at the time, and also at the time said patent was issued, and until January, 1868, namely: L. P. Smith, Alex. Caldwell, Lucien Scott, O. A. Hart, C. H. Peck, D. R. Garrison, George R. Taylor, & M. H. Insley, and from about the month of January, 1866, until the present time, said Smith has been president, and the said Caldwell vice-president of said company. The board of directors of said company consisted of eleven members, and not more than ten members were present at any meeting of the board, or together at any time during the
204 years 1866 and 1867.

4th. On the 26th day of December, 1867, the said Caldwell and wife executed and delivered to plaintiffs a deed of 8,023.27 acres of land, including the lands for the recovery of which this suit is brought, and being part and parcel of the lands described in the patent aforesaid, and at which time the plaintiffs paid to said Caldwell therefor the sum of twenty dollars per acre, making in all $160,464.40, and which said deed was duly recorded in the office of the register of deeds aforesaid on the 25th day of April, 1868, and, omitting the description of the lands only, is as follows:

"This indenture, made this twenty-sixth day of December, in the year of our Lord one thousand eight hundred and sixty-seven, between Alexander Caldwell and P. A. Caldwell his wife, of the city & county
205 of Leavenworth, State of Kansas, of the first part, and R. M. Shoemaker, Edward Miller, Carlos S. Greeley, S. M. Edgill, Robert E. Carr, William M. McPherson, J. W. Kinney & Mathew Baird, partners as Shoemaker, Miller & Co., parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of one hundred and sixty thousand four hundred and sixty-five dollars and forty cents to him in hand paid by the parties of the second part, the receipt whereof is hereby confessed and acknowledged, do by these pres-

ents grant, bargain, sell, remise, release, convey, and confirm unto the said parties of the second part and to their heirs and assigns forever, all of the following-described pieces and parcels of land lying and situate in the counties of Leavenworth and Wyandotte, & State of Kansas, being a part of the lands of the "Deleware Diminished Reserve" to wit:

206 "Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining. To have and to hold the said premises, with the hereditaments and appurtenances, unto the said parties of the second part, their heirs and assigns forever; and the said Alexander Caldwell, for himself and his heirs, does hereby covenant to and with the said parties of the second part, their heirs and assigns, that he is lawfully seized of the premises aforesaid; that the said premises are free and clear of and from all incumbrances whatsoever, and that he will warrant and defend the same, with the appurtenances, unto the said parties of the second part, their heirs and assigns forever, against the lawful claims of all persons whomsoever.

"In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"A. CALDWELL. [L. S.]
"PACE A. CALDWELL. [L. S.]

"Sealed and delivered in the presence of—
207 "W'M A. MARTIN,
"A. D. GILKESON.

("Interlineations made before signing.)

"STATE OF KANSAS,
"*Leavenworth County, ss:*

"Be it remembered that on this twenty-sixth day of December, A. D. eighteen hundred and sixty-seven, before me, the undersigned, a notary public within and for the county and State aforesaid, came Alexander Caldwell & Pace A., his wife, who are personally known to me to be the identical persons whose names are affixed to the foregoing instrument as grantors, and severally acknowledged the same to be their own voluntary act and deed.

"In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year last written.

[SEAL.] "A. D. GILKESON,
"*Notary Public.*"

208 5th. At the time the plaintiffs took said conveyance from Caldwell and wife, they, the plaintiffs, knew that the defendant W'm A. Simpson was in the possession of the premises in controversy in this action, by his tenants, and that the said Simpson claimed to own the same by a title which is hereinafter particularly described, and the plaintiffs then also had notice that the said Caldwell was a director of said railroad company at the time he paid for said patented lands and took the patent therefor, and at the time they, the pl'ffs, took their deed from the said Caldwell and wife.

6th. The rental value of the lands for which this suit is brought since the 26th day of December, 1867, is twenty-six hundred dollars, ($2,600.00)

7th. Since the said 26th day of December, 1867, prior to the

208½ commencement of this suit, the said defendant W'm A. Simpson has cut down, carried away, and converted to his own use, trees and growing timber on the premises for which this suit is brought, worth and of the value of seventeen hundred dollars ($1,700.00).

8th. All the defendants but W'm A. Simpson have occupied said premises as tenants of the said Wm. A. Simpson.

9th. On the 21st of February, 1867, the Deleware Indians were assembled together at their agency on said reservation for registration, as contemplated by the provisions of the treaty aforesaid. Besides the Indians and their agent, John G. Pratt, there were present the above-named Leonard F. Smith, Alexander Caldwell, and Samuel N. Simpson, a brother of the defendant W'm A. Simpson. Messrs. Caldwell
209 and Smith were present by request of said agent, but the said Samuel N. Simpson was there without request of the Government, or any of its officers or agents, and solely to further his own private interests. Simpson had spent a portion of the previous day with various influential members of said tribe, and had stopped the previous night with one Johnnycake, one of the chiefs of said tribe. During this time he was using his influence with the Indians to persuade them not to register or take any action with reference to their registration unless the railroad company aforesaid would donate to him a section of the lands authorized to be sold by said treaty. By this means, and for the express purpose of compelling the railroad company to give him a section of said lands without consideration, the said Samuel N. Simpson had obtained such an influeuce with the Indians that he was able to and
210 did control their action and prevent them from registering, although the agent was there present and desired to proceed with the registration of said Indians.

Thereupon Caldwell saw Simpson and requested him to withdraw his opposition to the registration of the Indians and to desist from persuading them not to register. But said Simpson refused, and persisted in using his influence and exertion among said Indians to induce them not to register or take any action with reference thereto. Whereupon, in order that all opposition to such registration might be removed, that is, the said Samuel N. Simpson might be induced to forego his opposition to such registration, and that the same might proceed, the said Caldwell & Smith promised the said Simpson that the said railroad company should comply with his exactions and demands, and donate him a
211 section of said lands, not including any improvements which might be thereon; and thereupon said Caldwell, Smith, and Samuel N. Simpson came to this city, and Smith, pretending to act for and in behalf of the said railroad company, then signed the written instrument following and attached the corporate seal of said company thereto, which instrument bears date February 21st, 1867, and was, on the 24th day of May, 1867, duly recorded in the office of the register of deeds aforesaid, and is as follows:

"Know all men by these presents, that the Missouri River Railroad Company, in consideration of one dollar and other valuable considerations to it, paid by Samuel N. Simpson, of Lawrence, Kansas, the receipt whereof is hereby acknowledged, do hereby convey, release, remise, and forever quit-claim to the said Samuel N. Simpson, his heirs & assigns forever, all the right, title, and interest acquired by the
212 Missouri River Railroad Company under treaty of July 4th, 1866, or by Len. T. Smith as its president, or that they may hereafter acquire under or by virtue of said treaty, of the following-described lands, to wit:

"The fractional part of section thirty-four, town. twelve, range twenty, lying north of the Kansas River; the south fractional half of section twenty-seven, town. twelve, range twenty, and the northeast fractional quarter, and east one-half of northwest quarter of section twenty-seven, town. twelve, range twenty; the east half of southeast quarter of section twenty-two, town. twelve, range twenty; the west half fractional of the *of the* northwest quarter of section twenty-six, town. twelve, range twenty, and the south half of the northeast quarter of the northwest quarter, and the southeast fractional part of the east half of the northwest quarter of section twenty-six, town. twelve, range
213 twenty, containing in all six hundred and forty-four & twenty-two hundredths acres, ($644\frac{22}{100}$,) being the lands of the Delaware Diminished Reserve, in Leavenworth County; it being understood that if there are any improvements on the above-described lands to be paid for under the treaty before mentioned, the said Simpson shall pay the same; and reference is also hereby made to an agreement of the parties, of this date, which qualidfiedly controls this deed, and all in law or in equity of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all rents, issues, and profits thereof; to have and to hold the same to the only proper use of the said Samuel N. Simpson, his heirs, and assigns forever. In witness whereof the said Missouri River Railroad Company, by its president, Len. T. Smith, has hereunto set its hand and seal this twenty-first day of February, in the year of our Lord one thou-
214 sand eight hundred and sixty-seven.

[SEAL.] "MISSOURI RIVER RAILROAD COMPANY,
"By L. T. SMITH, *President.*"

[U. S. stamp, $6.00.]

"STATE OF KANSAS,
"*Leavenworth County, ss:*

"Be it remembered that on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-seven, before me, a notary public in and for the county of Leavenworth, personally came Len. T. Smith, president, the party named in the foregoing deed, and acknowledged the signing and sealing thereof to be his voluntary act and deed for the uses and purposes therein mentioned.

"In testimony I have hereunto subscribed my name and affixed my notarial seal on the day and year aforesaid.

[SEAL.] "L. W. ROYS,
"*Notary Public.*

"Recorded May 24th, 1867, at 10 o'clock a. m.
"H. C. KELLER,"
"*Reg. of Deeds.*"

215 And at the same time the said Smith and Caldwell, pretending and assuming to act in the capacity and in the manner appearing and shown therein, signed the within instrument following, and attached the corporate seal of said company thereto, which instrument also bears date February 21st, 1867, and on the 31st day of March, 1868, was duly recorded in the office of the register of deeds aforesaid, and is as follows:

"The Missouri River Railroad Company has, for a valuable consideration, this day made a deed for the following-described lands: The

fractional part of section 34, town. 12, range 20, lying north of the Kansas River, and the south fractional half of section 27, town twelve, range 20, and the northeast fractional quarter & the east half of the northwest quarter section twenty-seven, town. 12, range 20, and the northeast fractional quarter and east half of the northwest quarter section 27, town. 12, range 20, and the east half of the southwest
216 quarter section 22, town. 12, range 20, and the west fractional half of the northwest quarter of section 26, town. 12, range 20, and the south half of the northeast quarter of the northwest quarter, and the south fractional part of the east half of the northwest quarter of section 23, town. 12, range 20, containing $644\frac{32}{160}$ acres, all in the county of Leavenworth, to the said S. N. Simpson; and it is agreed by said railroad company and the said Simpson, that if said company shall obtain a patent for any tract or all of said land described in said deed, they agreeing to use the same diligence to obtain title to the lands conveyed by said company that is used by the company to obtain title to other lands purchased by said company under the contract of purchase of said Deleware Diminished Reserve, Kansas, aforesaid, pursuant to the terms of the treaty of July 4th, 1866, the said company will allow the said Simpson to select other of said lands, equal in amount to the number of acres mentioned in
217 said deed for which the company shall not acquire title, and the said company will convey the same by good and valid deed to him in the event of the failure of the title the deed this day made of the lands to which said company has or shall obtain no title shall be void; and the said company agrees to give said Simpson a choice of any lands they shall acquire the title to, not then sold, under such contract of purchase, and to convey such lands in lieu of & to an equal amount to the lands described in the deed of this date to which the title of the company shall fail; and the said Leonard T. Smith, president, and Alexander Caldwell, vice-president, of said company, for and in consideration of the premises aforesaid, for themselves, jointly and severally, covenant and agree with the said Simpson that this agreement shall be well and truly kept by said railroad company.

"In witness whereof we have hereunto set our hands and seals on this 21st day of February, 1877.

218 "The interlineations between the tenth and eleventh lines were made before signing. Any improvements on the lands selected under this agreement, to be paid for under the treaty before mentioned, the said Simpson shall pay for.

"MISSOURI RIVER RAILROAD COMPANY,
"By L. T. SMITH, *President.*
"A. CALDWELL, *Vice-President.*
"S. N. SIMPSON."

'OFFICE OF REGISTER OF DEEDS,
"*City and County of Leavenworth, State of Kansas, ss:*

"I, John Wolkiewiez, register of deeds within and for the county aforesaid, do hereby certify that the within and foregoing instrument of writing was received by me for record this 31st day of March, A. D. 1868, at 3 o'clock p. m., and that the same is duly recorded in Book Y for recording agreements, etc., at page 553.

"In testimony whereof I have hereunto set my hand and official seal, the day and year aforesaid.

219 [SEAL.] "JOHN WOLKIEWICZ.
"By THOMAS PLOWMAN, *Deputy.*"

And the said instruments were by the said Simpson procured to be executed by the means, in the way, and for the purpose aforesaid.

10th. On the execution of said instruments they were deposited by the said parties with Robert Crozier, esq., to be delivered by him to said Samuel N. Simpson in case there should no longer be any difficulty in proceeding with the registration of said Indians, and thereupon said Samuel N. Simpson abandoned all further interference and opposition to the registration of the said Indians, and the next day returned to his home at Lawrence, in this State, and thereafter there was no longer any difficulty in proceeding with the registration aforesaid. And not long afterwards said Crozier delivered said instruments to said
220 John G. Pratt, who, in the forepart of May, 1867, delivered them to the said Samuel N. Simpson, and afterwards, and some time in June, 1867, the said Caldwell assented to such delivery to the said Samuel N. Simpson.

11th. The said L. T. Smith and Alexander Caldwell had never been authorized by the said railroad company, or by its board of directors, to sell or dispose of said lands, or to make the instruments bearing date Feb'y 21st, 1867, or either of them, nor had either of them ever been so authorized, nor did said company at any time afterwards ratify or confirm said attempted disposition of the lands in controversy.

12th. The nominal consideration of one dollar mentioned in the first of said instruments, dated Feb'y 21st, 1867, was never paid, and there was no consideration of any sort or kind ever had or received by said railroad company, or by either said L. T. Smith or Caldwell, from said S. N. Simpson or from any one else, for said instruments dated on said 21st of Feb'y, 1867, or for either of them, and the same were and
221 are without any consideration whatever, save and except only such consideration, if any, as the facts and circumstances inducing their execution, as already stated, and the agreement in the first of said instruments, that said Simpson should pay for whatever improvements there might be upon said premises, establish and make out.

13th. From the time of concluding said treaty up to the winter or spring of 1868, the lands in dispute were occupied by some of aforesaid Indians, who had their homes thereon until said winter or spring of 1868, at which time they removed therefrom and went to their new homes in the country south of this State.

14th. The lands described in the instruments of date Feb'y 21st, 1867, are the lands for which this suit is brought, and there were thereon at that time certain valuable improvements which had been made by the Indians prior to the conclusion of said treaty.

15th. On the 28th day of May, 1867, the said Samuel N. Simp-
222 son executed and delivered to the defendant William A. Simpson a deed of the lands in controversy, which was recorded in the office of said register of deeds on the 31st day of May, 1867, and is as follows:

"This indenture, made this twenty-eighth day of May, in the year of our Lord one thousand eight hundred and sixty-seven, between S. Newell Simpson and his wife, Kate L. Simpson, of the city of Lawrence, in the county of Douglas, and State of Kansas, of the first part, and William A. Simpson, of the second part, witnesseth: That the said parties of the first part, in consideration of the sum of one dollar, and of other valuable consideration, to them duly paid, have sold, and by these presents do grant and convey, to the said party of the second part, his heirs and assigns, all those tracts or parcels of land, situated in Leavenworth County and State of Kansas, and described as follows, to wit,

the fractional part of section thirty-four, town. twelve, range twenty, lying north of Kansas River; and the south fractional half of section twenty-seven, town. twelve, range twenty; and the northeast fractional quarter of east half of the northwest quarter of section twenty-seven, township twelve, range twenty; and the east half of the
223 southeast quarter of section twenty-two, township twelve, range twenty; and the west fractional half of the northwest quarter of section twenty-six, town. twelve, range twenty; and the south half of the northeast quarter of the northwest quarter, and the south fractional part of the east half of the northwest quarter of section twenty-six, town. twelve, range twenty; containing six hundred forty-four and $\frac{22}{100}$ acres in the aggregate, and being the same real estate conveyed to me by the Missouri River Railroad Company, by deed bearing date February 21st, A. D. 1867, with the appurtenances, and all the estate, title, and interest of the said party of the first part therein. And the said S. Newell Simpson does hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein, free and clear of all encumbrances, and that he will warrant and defend the same in the quiet and peaceable possession of said party of the second part, his heirs and assigns forever.

"In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year above written.

224 "SAMUEL N. SIMPSON. [SEAL.]

"Sealed and delivered in presence of—
"T. A. GORRILL."

"STATE OF KANSAS,
"*County of Douglas, ss:*

"On this thirteenth day of May, A. D. 1867, before me, a notary public in and for said county, came Samuel N. Simpson, to me personally known to be the identical person described in, and whose name is affixed to, the above conveyance as grantor, and acknowledged the same to be his own voluntary act and deed.

"In testimony whereof I have hereunto subscribed my name and affixed my official seal, on the day and year last above written.

[SEAL.] "T. A. GORRILL, *Notary Public.*"

16th. The nominal consideration of one dollar mentioned in said deed was never paid, and said deed was without any consideration in fact, and was made by the said Simpson and taken by his brother, the said William A. Simpson, by collusion and to complicate the title to
225 the said lands; and at the time he took said deed the said William A. Simpson had seen both of said instruments, dated February 21, 1867, and had notice of the facts and circumstances which induced the making of the same.

17th. On the execution of the instruments aforesaid and immediately thereafter the said Samuel N. Simpson entered upon and held possese sion of said premises until the sale as aforesaid to his brother, and th-latter immediately after the deed to him aforesaid went into possession of said premises and continued in possession thereof to the present time, and while thus in possession made valuable improvements
226 in the way clearing, fencing, & culivating said lands and erecting thereon two or three not very valuable buildings.

18th. On the 10th day of May, 1867, the plaintiffs, except as hereafter

qualified and stated, and the Union Pacific Railway Company, E. D., John D. Perry, and R. M. Shoemaker & Co., by one E. M. Bartholow, made, executed, and mutually delivered their certain contract in writing with said Samuel N. Simpson, William A. Simpson, one H. M. Simpson, & Simpson Brothers, in words & figures following:

"Whereas E. M. Bartholow, for R. M. Shoemaker & Co., has this day delivered to Simpson Brothers his certain drafts on W. J. Palmer as treasurer of the Union Pacific Railway Co., E. D., being three in number, and amounting in the aggregate to six thousand five hundred dollars:

"Now, therefore, the said Simpson Brothers & S. N. Simpson, H. M. Simpson, & W'm A. Simpson acknowledge & promise that said
227 drafts, when paid, shall be a full satisfaction of all accounts, claims, & demands now held by them, or belonging to them, against said R. M. Shoemaker & Co., Shoemaker, Miller & Co., John D. Perry, or the Union Pacific Railway Co., E. D., except as hereinafter specified. And in consideration of the above release, the said Union Pacific Railway Co., E. D., John D. Perry, R. M. Shoemaker & Co., & Shoemaker, Miller & Co., acknowledge full payment & full satisfaction for and on account of all claims, demands, and accounts against said Simpsons, or either of them, belonging to said Union Pacific Railway Co., E. D., John D. Perry, R. M. Shoemaker & Co., Shoemaker, Miller & Co., except as hereinafter specified. But it is understood that this settlement does not apply to any claims connected with the Stevens mortgage, (so called,) or with any property in North Lawrence, held and occupied & owned jointly by any of the parties hereto, or held and occupied for railroad purposes, nor does it apply to the debts of the Delaware Lumber
228 Company, an approximate estimate of which is hereto annexed, & which, so far as the same are just, are to be paid in the following proportion:

"R. M. Shoemaker ..... one-eighth
"R. M. Shoemaker & Co. ..... four-eighths
"J. D. Perry ..... one-eighth
"H. M. Simpson ..... one-eighth
"Estate of Gen. Lane ..... one-eighth

"Nor does it apply to any shares of stock in the capital of said railway co. which the said S. N. Simpson may claim to own.

"It is further agreed that if any amount is legally due Duncan & Co., that Union Pacific Railway Co. will assume & pay the same; and that if any amount is legally due Jackson & Mathews, that Simpson Brothers will assume & pay the same. And that a certain suit now pending in the district court, Douglas County, Kansas, in which Henry M. Simpson is plaintiff and R. M. Shoemaker & others are defendants, is included in the settlement hereinbefore made, and the said
229 Simpsons will dismiss the same at their own cost.

"W. A. SIMPSON.
"SIMPSON BROTHERS.
"S. N. SIMPSON,
"Per H. M. SIMPSON.
"H. M. SIMPSON.
"UNION PACIFIC R. W. CO., E. D.
"R. M. SHOMAKER & CO.
"SHOEMAKER, MILLER & CO.
"JOHN D. PERRY,
"By E. M. BARTHOLOW.

"LAWRENCE, KANSAS, *May 10th*, 1867."

But the court finds that, in so far as said contract includes or relates to (if at all) the interest of the plaintiffs, if any at the time, in or to said lands in controversy in this suit, the said Bartholow acted without any authority from the plaintiffs, and his action in signing said instrument for the plaintiffs has not since then been ratified or confirmed by the plaintiffs in so far as it refers to any interest of the plaintiffs in said lands.

230 19th. In the fall of 1867 said Samuel N. Simpson, acting for the defendant, William A. Simpson, tendered to said L. T. Smith for the said railroad company, and also to said Caldwell, for and on account of the improvements on the said premises which the said Samuel N. Simpson was to pay for, according to the terms of said instrument, dated February 21st, 1867, the sum of fourteen hundred dollars in lawful money, but the said Smith and Caldwell refused to receive the same, and did and would not accept the same.

At that time the said Smith was not the treasurer of said company, but Lucien Scott was such treasurer.

231 And, as conclusions of law:

1st. The defendants are not entitled to any relief on the claim of right and title set up and asserted by them. To each of which conclusions of law the defendants herein, and each of them, now at the time except.

2d. The plaintiffs have the legal title to, and are entitled to, the possession of the lands described in their petition. To each of which conclusions of law the *the* defendants, and each of them, now at the time except.

3d. The plaintiffs are entitled to a judgment against the defendant, William A. Simpson, for the sum of four thousand and three hundred dollars, the value of the use of the premises in controversy, and of the trees and growing timber cut down, carried away, and converted to the use of said defendant Simpson, as assessed and found in the conclusions of fact before stated. To each of which conclusions of law the defendants herein, and each of them, now at the time except. And also

232 a judgment against the other defendants for the aforesaid rental value of said premises, namely, two thousand and six hundred dollars. To each of which conclusions of law the defendants herein, and each of them, now at the time except, the said other defendants only being liable to the plaintiffs for such rental value and not for the trees and growing timber cut down, carried away, and converted to the use of the defendant Simpson, as aforesaid. To each of which conclusions of the law the defendants herein, and each of them, now at the time except.

And then, at the time when said court made the aforesaid conclusions of the fact found, said defendants requested said court to make other and further conclusions of fact, and to find and state all such conclusions of fact as the evidence showed; but the court refused to make any other or further conclusions of fact than those found as aforesaid, to which ruling and decision of the court said defendants then excepted.

233 And then, on said fifth day of November, A. D. 1870, at said September term of said court, and on the same day, when said conclusions of fact found and of law were made by said court, the defendants in said action moved said court to vacate and set aside the findings, conclusions of fact, decision, conclusions of law, and each of

them made their said action upon written grounds filed in said action in said court at the time of making the motion. Of which motion, and of the indorsements thereon, and of the grounds on which the same was made, the following is a copy, to wit:

234 STATE OF KANSAS,
Leavenworth County, ss:

In the district court of the first judicial district of the State of Kansas, sitting in the county of Leavenworth, in said State.

C. S. GREELEY, S. M. EDGELL, W'M M. McPherson, Rob't E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker, J. W. Kenny, partners, as Shoemaker, Miller & Co., plaintiffs,

vs.

WILLIAM A. SIMPSON, DAVID ACKERS, William R. Smith, George Arbold, H. Johnston, Andrew Barnett, H. V. Excendine, Joseph Leon, J. H. Cochran, defendants.

And now come the above-named defendants, and each of them, and move the court to vacate and set aside the findings, conclusions of fact, decision, conclusions of law, and each of them, heretofore rendered herein, and to grant a new trial of this action for the following
235 causes, affecting materially the substantial rights of the said defendants, and each of them.

1st. For and because of irregularity in the proceedings of the court, by which the said defendants were prevented from having a fair trial.

2d. For and because of abuse of discretion of the court, by which the said defendants were prevented from having a fair trial.

3d. For and because the said defendants were prevented from having a fair trial, by and in consequence of the orders of the court and its rulings excepted to at the trial.

4th. For and becaus' of misconduct of the prevailing party, the plaintiffs.

5th. For and because of accident and surprise which ordinary prudence could not have guarded against.

6th. For and because of excessive damages appearing to have been given under the influence of passion and prejudice.

236 7th. For and because of error in the assessment of the amount of recovery, it being too large.

8th. For that the decision is not sustained by sufficient evidence.

9th. For that the decision is contrary to law.

10th. For and because of error of law occurring at the trial and excepted to by said defendants.

11th. Because the court erred in excluding certain evidence offered by said defendants.

12th. Because the court erred in admitting certain evidence.

13th. Because the court erred in its rulings in relations to the admission and exclusions of evidence, and in the manner in which it caused the case to be conducted at the trial.

14th. For and because of error of law occurring at the trial and excepted to by said defendants in relation to various matters other than those above particularly specified.

237 15th. For and because of irregularity in the proceedings of the prevailing party, the plaintiffs, by which the said defendants prevented from having a fair trial.

16th. For that the conclusions of fact found in this the above-entitled action are not sustained by sufficient evidence.

17th. For that said conclusions of fact found are contrary to law.

18th. Because the court has not arrived at and found conclusions of fact on or in relation to all the evidence.

19th. Because the court has not found all such facts as it ought to find.

20th. Because the court has not found all such facts material to this action, or the issues therein, as are shown by the evidence.

CLOUGH & WHEAT,
Attorneys for Defendants.

On which are the following indorsements:

238 Ex. No. 2998. R. M. Shoemaker & al. vs. W. A. Simpson et al. Motion for new trial. Filed Nov. 5th, 1870. H. J. Dennis, clerk.

And the said court then, on said day, overruled said motion of said defendants, to which ruling and decision of the court said defendants then excepted; and then said court, at said term thereof, on the day last aforesaid, rendered certain judgments in said action, and made certain orders in said action, to which orders and judgments, and each of them, said defendants, and each of them, then at the time excepted.

Which judgments, orders, exceptions, motion, rulings, decis-
239 ions, and exceptions are all shown by a journal entry then made and entered of record in said action in said court on the journal thereof, with and as part of a journal-entry, on that said 5th day of November, A. D. 1870, made on the journal of said court in said action; which journal-entry includes the names of the parties to said action. The recital last above mentioned, the conclusions of fact found, and the conclusions of law aforesaid, and the several exceptions thereto, and motion, ruling, and decision thereon last above-mentioned, and the exceptions thereto, and the judgments rendered and orders made in said action, as aforesaid, and the several exceptions thereto. Of which said journal-entry the following is a copy, to wit:

"And thereupon the defendants herein moved the court to vacate and set aside the decision made in this action, and the findings, conclusions of fact found, and conclusions of law, and to grant a new trial of this action. And said defendants then filed herein their motion in that behalf, and written grounds therefor.

"And thereupon the court now overrules said motion; to which
240 ruling and decision of the court said defendants now here at the time except.

"It is therefore considered by the court that said plaintiffs have and recover of and from said defendants the lands and tenements described in said petition, to wit:

"The fractional part of section (34) thirty-four, town, twelve (12,) range (20) twenty, lying north of the Kansas River; the south fractional half of section twenty-seven (27,) town. twelve (12,) range twenty (20;) and the northeast fractional quarter and east one-half of northwest quarter of section (27) twenty-seven, town. twelve (12,) range twenty (20;) the east half of southeast quarter of section twenty-two (22,) town.

twelve (12,) range twenty (20;) the west fractional half of the northwest quarter of section twenty-six (26,) town. twelve (12,) range twenty (20;) and the south half of the northeast quarter of the northwest quarter, and the south fractional part of the east half of the northwest quarter of section twenty-six (26,) town. twelve (12,) range (20) twenty, con-
241 taining, in all, six hundred and forty-four and $\frac{22}{100}$ acres, lying and being in the county of Leavenworth, State of Kansas; and the possession of said lands and tenements, to which judgment, and to each of said decisions, the defendants herein, and each of them, now at the time except, as well as all costs in and about this suit expended, taxed at $; to which judgment and to each of said decisions, the defendants herein, and each of them, now at the time except, and that execution issue for the delivery of possession of aforesaid lands and tenements, in pursuance of this judgment, and for the costs herein. To which judgment, and to each of said decisions, the defendants herein, and each of them, now at the time except.

"And it is further considered, ordered, and adjudged by the court, that said plaintiffs have and recover of said William A. Simpson the sum of forty-three hundred ($4,300.00) dollars, the value of the rents, issues, and profits of said lands and tenements, and of the timber taken from said land by said William A. Simpson, as above found. To which judgment, and to each of said decisions, the defendants herein, and each of them, now at the time except.

242 "And it is further considered, ordered, and adjudged by the court, that said plaintiffs have and recover of the other defendants herein, except the said William A. Simpson, the sum of twenty-six hundred ($2,600.00) dollars, to be credited as part of the said $4,300, if collected, it being the value of the rents and profits above found. To which judgment, and to each of said decisions, the defendants herein, and each of them, now at the time except. And that execution issue on each of the above judgments and the amounts thereof; to which judgment, and to each of said decisions, the defendants herein, and each of them, except.

"And thereupon, at the request of the defendants herein, and with the consent of the plaintiffs herein, and upon good cause being shown, it is ordered by the court here that the time of said defendants, for making a case in this the above-entitled action, and the time within which the same may be served on the plaintiffs herein, or their attorneys, be, and it is hereby, extended to and for ninety days (90) from this time, and the time for them in which so to do is hereby so extended for making their case herein."

243 And be it further remembered that said court then, on said fifth day of November, A. D. 1870, at said September term thereof, then, as aforesaid, made the several rulings and decisions, judgments and orders, shown by said journal entry, to each of which the exceptions shown as above written at the time, when made respectively by said defendants and each of them.

And said court then, upon good cause shown, and with the consent of said plaintiffs, then extended the time of said defendants for making a case in said action, and the time within which the same might be served ninety days from that time. And it appearing to the undersigned, H. W. Ide, judge of the said court, before whom said action was tried, that this case was served on the attorneys of said plaintiffs in said action on the 11th day of November, A. D. 1870; and this case, and all amendments suggested thereto, being now presented and submitted to said judge, to be settled, certified, and signed by said judge,

I, the said H. W. Ide, as such judge, do now certify, settle, and
244 sign this as and for a case made for the supreme court of the State of Kansas, this 15th day of November, A. D. 1870.

H. W. IDE, *Judge.*

Attest:

W. J. DENNIS,

[SEAL.] *Clerk of the District Court in and for Leavenworth County, Kansas.*

By H. C. WELLER, *Deputy.*

Upon which are the following endorsements:

State of Kansas, supreme court, ss. No. 623. W'm A. Simpson vs. C. S. Greeley et als. Petition in error and transcript. Filed Nov. 16th, 1870. A. Hammatt, clerk.

245 And thereupon was filed, to wit, November 16th, 1870, a præcipæ for a summons in said cause, which is in words and figures as follows, to wit:

SIMPSON
v.
GREEL'Y & ALS.

The clerk of the supreme court of the State of Kansas will issue a summons in the above case for the said defendants named therein, directed to the sheriff of Leavenworth County, Kansas.

CLOUGH & WHEAT,
Att'ys for Pl'ff in Error.

And thereupon, to wit, on the 16th day of November, 1870, there was issued out of said supreme court a summons for said defendants, which is in words & figures as follows, to wit:

246 SUPREME COURT, *the State of Kansas, ss:*

To the sheriff of Leavenworth County, greeting:

You are hereby commanded to notify C. S. Greeley, S. M. Edgell, W'm M. McPherson, R. E. Carr, Ed. Miller, Mathew Baird, R. M. Shoemaker, & J. W. Kenney, (partners as Shoemaker, Miller & Co.,) David A. Acres, W'm R. Smith, Geo. Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, & J. H. Cochran, that William A. Simpson did, on the 16th day of November, A. D. 1870, file in the clerk's office of the supreme court of Kansas, his petition in error and transcript of record, the object of which is to obtain the reversal of a certain judgment rendered against him by the district court for the 1st judicial district, State of Kansas, sitting within and for the county of Leavenworth, at the September term thereof, A. D. 1870, in an action pending before said court, wherein the said C. S. Greeley, S. M. Edgell, W'm H. McPherson, R. E. Carr, Ed. Miller, M. Baird, R. M. Shoemaker, & J. W. Kenney, partners as R. M. Shoemaker, were plaintiffs, and the said W'm A. Simpson, David Acres, W'm R. Smith, David Arbold, A. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, & J. H. Cochran, were defendants.

You will make due return of this summons in error on or before the 28th day of November, A. D. 1870.

Witness my hand and the seal of said court, affixed at my office in the city of Topeka, this 16th day of November, A. D. 1870.

[SEAL.] A. HAMMATT, *Clerk.*

247 (Indorsed:) 623. Supreme court, the State of Kansas. W'm A. Simpson versus C. A. Greeley et als. Summons in error. Issued Nov. 16th, 1870. Returnable Nov. 28, 1870. Filed Nov. 28th, 1870. A. Hammatt, clerk. Clough & Wheat, att'y for pl'ff.

We hereby waive service of this the within summons for & on behalf of C. S. Greeley, S. M. Edgell, W. M. McPherson, R. E. Carr, E. Miller, M. Baird, R. M. Shoemaker, & J. W. Kenney, partners as Shoemaker, Miller & Co., & as their attorneys, and we enter their appearance by us to the within-named petition in error in the supreme court of the State of Kansas.

Dated this 26th day of November, A. D. 1870.

ROBERT CROZIER,
THO'S P. FENLON,
Att'ys for said Def't.

I hereby waive service of the within summons for and on behalf of David Acker, W'm R. Smith, David Arbold, A. Johnston, A. Barrett, N. V. Excendine, J. Leon, & J. H. Cochran, as their attorney, & I enter their appearance by me to the within-mentioned petition in error in the supreme court of the State of Ka's.

Dated this 26th day of November, A. D. 1870.

H. GRISWOLD,
Att'y for the persons above named.

248 And be it further remembered that thereafter, at the January term of said supreme court, holden at Topeka, in the State of Kansas, to wit, on the 12th day of January, A. D. 1871, the said cause came on for hearing by said court.

And thereupon the said plaintiffs and the said defendants both appearing by their respective attorneys, the following proceedings were had in said cause, as appears by the journal of said court of said day, to wit:

WILLIAM A. SIMPSON
v.
CARLOS S. GREELEY ET ALS. } 623.

This cause came on to be heard and was argued by L. B. Wheat, esq., of counsel for plaintiffs in error, and by E. Stillings, esq., of counsel for defendants in error, and taken under advisement by the court.

249 This cause was brought to this court on petition in error and transcript of the record of the district court of Leavenworth County, Kansas.

And be it further rem'bured *remembured* that thereafter, at the July term, A. D. 1871, of said court, to wit, on the 22d day of December, A. D. 1871, said cause came on for decision. And thereupon the following proceedings were had, as appears by the journal of said court of said day, to wit:

WILLIAM A. SIMPSON
vs.
CARLOS S. GREELEY ET ALS. } 623.

This cause came on for decision, whereupon Kingman, C. J., delivered the opinion of the court, and it is ordered and adjudged that the
250 judgment of the court below be affirmed with costs. And hereof let execution issue.
All the justices concurring.

And thereupon, to wit, on the 22d day of December, 1871, the following syllabus and opinion of said court was delivered in said cause by said court here, per Kingman, C. J., to wit:

252 WILLIAM A. SIMPSON
vs.
C. S. GREELY ET AL. } Error from Leavenworth County.

Affirmed.

Syllabus by the court.

KINGMAN, C. J.

1. This court will not reverse a cause because the plaintiff was suffered to amend his petition by interlineation, where it is apparent that the defendant was not injured thereby.

2. S., as president of a railroad company, made a deed for the company to certain lands. At the same time C. gave an instrument in writing to the purchaser, in which it was recited that the R. R. Co. had made such a deed. Held that this recital estopped C. and those holding under him, with knowledge of the facts, from denying that S. was authorized by the company to make the deed.

3. A deed made in February, 1867, using, as terms of conveyance, these words, "convey, remise, release, and for ever quit-claim," does not operate as an estopp*le* to prevent the grantor or his vendees from setting up an after-acquired title to the same lands.

253 4. In February, 1867, the Mo. R. R. Co. had no such interest in the lands known as the Delaware Diminished Reserve as that they could convey the same by deed.

5. Such a deed, made at that time, without consideration, and induced by vicious causes, cannot be set up as an equitable defense to a suit for the recovery of the land, as such a deed has no equity, and will not be enforced.

6. If there is a misjoinder of causes of action, and the misjoinder is apparent on the face of the petition, and is not taken advantage of by demurrer, the defect is waived.

7. When one of the findings of fact by the court is capable of bearing two constructions, that one will be given it that brings it within the issues in the case.

All the justices concurring.

254 W. A. SIMPSON
v.
C. S. GREELY ET AL.

Opinion.

The practice of amending pleadings by interlineation is very reprehensible, but when the party has answered after such an amendment, he cannot be heard on that point when asking a reversal. It is the duty of each court to preserve its records, and prevent their mutilation; but it would be a burlesque on the administration of justice if, after a protracted trial of an important case, the judgment should be reversed for a cause that in no way affected the rights or interests of the party complaining.

The action was instituted to recover the possession of certain lands forming part of what was once the Delaware Diminished Reserve, and also for rents of said land, and for timber taken off the same.

The case was tried by the court, which made numerous findings of fact, and gave judgment for the pl'ffs. From that judgment the defendants appeal to this court. Pl'ffs and def't claimed to derive title from, and by virtue of, the provisions of the treaty with the Delaware Indians made July 4, 1866, and ratified on the 26th of the same month.

255 The pl'ff's title was a patent from the United States to the land, dated Oct. 26th, 1867, to A. Caldwell, the assignee of the Missouri River Railroad Company, and a deed from Caldwell and wife to pl'ffs dated December 26th, 1867. Thus the pl'ffs showed a perfect paper title in themselves, and which alone would entitle them to recover.

The def't, (pl'ff in error,) as a defense, presented in evidence certain facts and papers, which, it is claimed, were of themselves sufficient to establish his right to the land, and prevent a recovery.

The defendant read in evidence a deed from the Missouri River Railroad Company, by L. T. Smith, president, to Samuel N. Simpson, dated Feb'y 21, 1867, to the land in controversy, which deed used the following terms of conveyance: "do hereby convey, remise, release, and forever quit-claim to the said Samuel N. Simpson, his heirs and assigns, forever, all the right, title, and interest acquired by the Missouri River Railroad Company under treaty of July 4, 1866, or that they may hereafter acquire under or by virtue of said treaty."

The deed also contained this stipulation: "It being understood
256 that, if there are any improvements on the above-described lands to be paid for under the treaty before mentioned, the said Simpson shall pay for the same, and reference is also hereby made to an agreement of the parties of this date, which, qualified, controls this deed."

This agreement, which is in evidence, is made by Smith, president, and Caldwell, vice-president, of the road, and Samuel N. Simpson, and recites the making of the deed for the land in controversy, and covenants, among other things, that the company will use the same diligence to obtain a patent for this land that they do to obtain a patent for other lands purchased by said company "under the contract of purchase of said Delaware Diminished Reserve, pursuant to the terms of the treaty of July 4, 1866; and if the company do not acquire a title to said lands, Simpson shall be allowed to select other of said lands equal in amount, and the company will convey the same to the said Simpson; and Leonard T. Smith, president, and Alexander Caldwell, vice-president, of said company, covenant that the agreement shall be well and truly kept by

the railroad company." These papers were recorded on the 31st of March, 1866. The land was conveyed by deed of S. N. Simpson
257 and wife to the pl'ff in error on the 28th of May, 1867.

The court found, as a fact, that the pl'ffs, when they took the conveyance from Caldwell to themselves, knew that defendant Simpson was in possession of the land, claiming under the title above mentioned.

The court also found that S. N. Simpson had obtained such an influence over the Indians that he was enabled to prevent them from registering, as contemplated by the provisions of the treaty of July 4, 1866, and that he actually did prevent them from registering, and that he did so for the purpose of compelling the railroad company to give him a section of said lands without consideration, and the deed and agreement above mentioned were the result of Simpson's efforts to obstruct the carrying out the provisions of the treaty, and no other consideration passed therefor; and the testimony fully sustains the findings of the court on this particular. The court further finds that the said Smith and Caldwell had never been authorized by the said railroad company, or by its board of directors, to sell or dispose of said lands, or to make the instrument bearing date Feb'y 21st, 1867, nor had either of
258 them been so authorized, nor did the company at any time afterwards ratify or confirm said attempted disposition of the lands in controversy.

The court found that the deed from S. N. Simpson and wife to pl'ff in error was without consideration, and was taken by pl'ff in error by collusion with his brother, S. N. Simpson, and to complicate the title to the said lands; that when he took the deeds pl'ff in error had seen both of said instruments dated February 21st, 1867, and had notice of the facts and circumstances which induced the making of the same. It is further found that W'm A. Simpson tendered Smith, for the railroad company, for the improvements on the premises that Simpson was to pay for, the sum of fourteen hundred dollars, in the fall of 1867, which they refused to accept.

So much of the findings of fact as made by the court are presented that the views of the court may be more readily understood. The findings are very voluminous, and are so far supported by the evidence that, according to well-established principles, we cannot, in this court, say that they are wrong. The evidence does not show the parties concerned in the original transaction, out of which this suit has grown, in
259 the most favorable light. If one party attempted to obtain a title to valuable property by obstructing the legitimate action of others, the other party removes that obstruction by stipulations which they hasten to make valueless as far as in their power. These remarks are made in response to the comments of the eminent counsel on either side, who not only claimed the land by virtue of legal rights, but by appeals to "conscience and a sense of justice."

The court happily has no power to enforce its own ideas of right and justice in this or any other case. Such power would make a court a despotism, settling questions not by any fixed standard or settled rules, but by an arbitrary decision, according to the ever-varying notions of justice. The court can only declare the law, and leave it to operate upon the facts of the case. The law holds the deed of the 21st of February, 1867, purporting to convey the land in controversy to Simpson by the Missouri River Railroad Company, to be inoperative as a conveyance, because the parties pretending to act for the company had
260 no authority to make such a conveyance, and their acts in the premises were never ratified by the company, and, therefore, the deed as a conveyance did not bind the railroad company.

The deed of 21st of February, executed by Smith, purported to be done by the railroad company, by him as president. By the contract of the same date Caldwell, over his signature, recited that the railroad company had made such a deed. There is nothing appearing in the testimony showing that Simpson had any knowledge that Smith was acting without full authority from the company. It is claimed that because of Caldwell having so made such statement in the contract that neither he nor those claiming under him can now be heard to say that Smith had no authority from the company to make the deed.

The defendants in error took their title with a full knowledge of Simpson's claim, and of the grounds on which it rested; therefore they are in no better condition than Caldwell himself would be had the title remained in him. Would Caldwell have been estopped from denying that Smith had authority from the railroad company to make the
261 deed to Simpson, which he made on the 21st of February, 1867?

If good faith would not permit Caldwell to deny what he had solemnly asserted under his hand and on the faith of which Simpson had acted, then the fact that Smith had no authority from the company to make the deed is of no importance, for it is a fact that neither Caldwell nor those holding under him can be allowed to prove.

It is merely saying that a man shall not show the truth as to a certain fact, as to do so would be a fraud upon some party who has relied upon his previous acts in his affairs.

We thus proceed in the examination as though the deed from the railroad company was made upon sufficient authority from the company to Smith. To clear the case from obscurity we may assume that the title of the plaintiffs was also under the railroad company, though this is a point not free from great doubt, but it places the plaintiffs in error in the most favorable attitude, and his claim in a position more advantageous than is, perhaps, strictly its due.

While Caldwell, and those holding under him, are estopped
262 from denying that Smith had authority to make the conveyance that he did, it is not an estopp*le* that creates an estate, or runs with land. It grows out of the recitals in the bond signed by Caldwell, and because it was the act of Caldwell, and not out of the deed of Smith as president of the road. The deed itself is not of a character that works an estoppel against a subsequently acquired title by the grantors. The deed itself is at most a quit-claim deed. The terms used are "convey, remise, release, and forever quit-claim." Such a conveyance does not prevent the grantor from acquiring subsequently a perfect title to the land, and will not estop him from asserting such a title against the grantee. (Bell v. Twilight, 6 Foster, 401; McCracken v. Wright, 14 Johnson, 193; Woodman v. Hubble, 9 Cowan, 613; Comstock v. Smith, 13 Pickering, 116; Miller v. Ewing, 6 Cushing, 34.) The true principle is thus stated:

"The general doctrine prevailing in the United States is, that no estate can be passed by the ordinary terms of a deed, unaccompanied with covenants of warranty, which is not vested in interest at the time, and that estates subsequently acquired, whether by purchase
263 or descent, are unaffected by such previous conveyance in the hands of the grantor or those claiming under him. This general doctrine is, however, subject to this qualification: that where it distinctly appears, from the face of the instrument, without the covenant of warranty, either by recital or otherwise, that the intent of the parties was to convey and receive reciprocally a certain estate, the grantor will be estopped from denying the operation of the deed according to

such intent." (Clark v. Baker, 14 Cal., 612; Van Rensalear v. Kearney et al., 11 Howard, 297.)

The deed from the railroad company to Simpson was simply a quit-claim deed, passing only the interest which the company then had in the land, and therefore it does not purport to convey a greater estate than the company then had, and is not affected by the provisions of sect. 4, page 354, of the compiled laws, which was in force when the deed was made. Technically, then, this deed created no estoppel.

The question then arises, what effect had the conveyance at the time it was made? In other words, had the railroad company such an
264 interest in the land as that they could make a binding and legal contract in relation to it? The company certainly had not any legal title to the land. Neither had it any possessory right whatever. There was nothing like the right that attaches to the possession of a man who settles on the public lands open to settlement. Before such a man has paid for his land, or proved up his settlement, he has a clear right of possession; he is on the land in conformity with law. If he sell his possessory right and gives up his improvements, the sale has usually been held a sufficient consideration to uphold a contract for the purchase-money. But if the sale was by deed, the deed conveyed no interest in the land. Nor is this the case of a man who has entered land, paid the Government for it, received a certificate of purchase, and waits the action of the proper departments of the Government for his patent; for he has an equitable title, which, if there be no error, will ripen, without any action of his, into a perfect legal title. His possession is lawful, and his right to the land absolute, though his legal title may not be perfect.

This case is also clearly distinguishable from those cases where
265 claims of title are pending before boards of commissioners, and are ultimately confirmed, as in Landers v. Brant, 10 Howard, 348. In such cases the decision confirms a pre-existing right, and the decision is carried into effect by a patent evidencing the pre-existing right and intermediate conveyances are upheld on the ground probably (although in some cases other reasons are given) that the right had vested before the issue of the patent, and the patent was but the solemn and formal evidence furnished by the Government of the existence of the right to the land, and as to intermediate conveyances with covenants of warranty or seisin, the title reverted back to the time when the right accrued.

Nor is this like a case where a man sells lands to which he may have no right in law, and the purchaser is admitted into possession, and ultimately through that possession obtains a title, and he is sued for the purchase-money, and attempts to set up these facts in defense, and will not be allowed to do so because he cannot set up a fraud in which he participated as a bar to a recovery, as in Fackler v. Ford, 23
266 Howard. We have adverted to these different classes of cases as we have been refer'ed to them, as upholding the title of plaintiff in error.

In this case, when the deed was made the railroad company had neither the legal title nor the possessory right to a foot of the land sold; it could not have gone on to it without being trespassers. So far as the court can know, it might never have obtained a right to any of the land, even had the Government observed all the provisions of the treaty and the stipulations of the contract between the company and itself, for it was possible that the land would all be absorbed by the Indians who might elect to hold in severalty, as authorized by the treaty, not the tract in controversy only, but all the land in the reserve.

A mere possibility is not the subject of a deed unless it be coupled with an interest. (Jackson v. Catlin, 2 Johns., 258; Fairbanks et al. vs. Williamson, 7 Maine, 96.)

There was in this instance a possibility, one which has developed into a very substantial entity. It is difficult to determine whether it
267 was coupled with a subsisting interest. We are inclined to think it was not. It was one of those speculative chances that may result in splendid realities or prove barren in its consequences. If such was its character, the land was not then the subject of contract at all between the parties, that is, of a legal, binding contract, capable of being enforced.

It is true that the company had accepted the terms of the treaty as offered it by the Secretary of the Interior, had given the bond required, had entered into an executory contract to take the residue of the land and pay therefor $2.50 per acre. But it was to get no lands and make no payments until it was ascertained whether there would be any lands for it to get, and where those lands were, was determined.

By the treaty the company was offered the opportunity to purchase in preference to others; it had accepted the offer, and bound itself to comply with the conditions upon which it was offered, and this was all. It had no right to an acre of land, no title, no possession. It had a mere possibility dependent upon conditions not under its control,
268 as well as upon conditions that it had to perform.

In this situation it is clear that the company could make no legal conveyance of the land. It is possible that a contract for the sale of the land, executory in its character, made in good faith, for a valuable consideration, would be enforcible in equity, when, if ever, the company became the owners of the land.

Such is not this case. There was no consideration; the inducements to make the deed were inherently vicious. The purchaser took his deed with a full knowledge of the condition of the title, and must stand upon the title he took. No court could find an equity in it, and of course would not enforce it. The plaintiff in error is in no better position than his brother was when he took the deed from the company. He purchased with a full knowledge of the facts, paid nothing, and took nothing. The court correctly decided that the plaintiffs were entitled to the land.

This conclusion on the main question in controversy also set-
269 tles many of the exceptions made on the taking of the evidence.

The paper mentioned in the 18th finding of fact has nothing to do with this case. It was made in May, and it is claimed that thereby the plaintiffs released their interest in the land when the title to the land did not accrue till December afterwards. To claim that this was a release of the land title so obtained is absurd. This settles quite a number of objections as to the admission of testimony.

The petition was for the recovery of land, for rents, and profits, and for timber cut and carried off from it. It is insisted that there is a misjoinder as to this last cause of action. Supposing that to be true (which is not conceeded) the pl'ff in error cannot take any advantage of it, as he has waived it. The improper joinder of several causes of action is cause for demurrer. (Code, sec. 89, 5th clause.) This defect, if it be one, was apparent on the face of the petition; plaintiff did not demur, and thus waived the defect. (Sec. 91.)

Another objection is that the court found the rental value of the land up to the time of the judgment. We do not so read the finding.
270 It is to be presumed that the finding of a court is confined to the

issues of the case, and this presumption will hold unless the contrary clearly appears. When the court finds the rental value from the time when the pl'ff's title was perfected, at a certain sum, it is a fair presumption, and not inconsistent with the language used, that it was from that time till the suit was brought. To construe it as running up to the time of the judgment, is to infer that the court erred, without a certain ascertainment of that fact from the record.

We have examined the whole record and expressed our views upon a few of the errors alleged, and have found no sufficient cause for setting aside the judgment. It is affirmed.

All the justices concurring.

271 And thereupon, to wit, on the 22d day of December, A. D. 1871, pursuant to the order and judgment of said court above set forth, the following mandate of said supreme court was issued to the said court below, to wit, the district court of the 1st judicial district, sitting in and for the county of Leavenworth and State of Kansas, which said mandate is in words and figures as follows, to wit:

272 SUPREME COURT,
The State of Kansas, ss:

To the district court within and for the 1st judicial district, Leavenworth County, Kansas, greeting:

Whereas in a certain civil action lately pending before you, wherein Carlos S. Greeley et als. were plaintiffs and William A. Simpson et als. were defendants, a judgment was rendered by you in favor of the said Carlos S. Greeley et als. On a transcript of which judgment and record said William A. Simpson et als. prosecuted a petition in error in the supreme court within and for the State of Kansas;

And whereas at the July term of said supreme court, A. D. 1871, on consideration of the said petition in error, it was ordered and adjudged by the said supreme court that the said judgment of the court below be affirmed with costs:

You are therefore commanded that, without delay, you cause execution to be had of the said judgment of the supreme court, according to law, the said petition in error to the contrary notwitstanding.

Witness my hand and the seal of said supreme court, affixed at my office in the city of Topeka, on the 22d day of December, A. D. 1871.

[L. S.] A. HAMMATT, *Clerk.*

273 THE STATE OF KANSAS,
The Supreme Court, ss:

I, Abram Hammatt, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true, full, and correct transcript of the petition in error, transcript of the record of the district court, (as exhibits thereto attached,) journal entries, orders, and judgments, and all proceedings had in said supreme court, or by authority thereof, in said above-entitled cause, as appears of record in my office.

As witness my hand and official seal hereto attached this thirtieth day of December, A. D. 1871.

[SEAL.] A. HAMMATT,
Clerk Supreme Court, State of Kansas.

274 Supreme Court of the United States, of December term, in the year of our Lord one thousand eight hundred and seventy-two.

WILLIAM A. SIMPSON, PLAINTIFF IN ERROR,
vs.
C. S. GREELEY, S. M. EDGELL, WILLIAM M. McPherson, Robert E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker, and J. W. Kinney, partners as Shoemaker, Miller & Co., David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, J. H. Cochran, defendants in error.

Afterwards, to wit, on the first Monday of December, in the same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said William A. Simpson, by W. W. Nevison, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit:

1st. The supreme court of the State of Kansas erred in holding
275 and deciding that on the 21st day of February, A. D. 1867, neither the Missouri River Railroad Company, nor A. Caldwell, nor the assignees of said railroad company, under or by virtue of a treaty concluded on the 4th day of July, A. D. 1866, between the United States and the Delaware tribe of Indians, and ratified on the 10th day of August, 1866, or any acts done under the same prior to said 21st day of February, 1867, had any right or interest in the following-described land, the subject of the action aforesaid, to wit: The fractional part of section 34, township 12, range 20, lying north of the Kansas River; and the south fractional half of section 27, township 12, range 20; and northeast fractional quarter, and the east half of the northwest quarter section 27, township 12, range 20; and the east half of southeast quarter of section 22, township 12, range 20; and the west fractional half of the northwest quarter of section 26, township 12, range 20; and the south half of the northeast quarter of the northwest quarter, and the south fractional part of the east half of the northwest quarter of section 26, township 12, range 20; containing $644\frac{22}{100}$ acres, all in the county of Leavenworth, State of Kansas.

276 2nd. That said court erred in holding and deciding that on the 21st day of February, A. D. 1867, under said treaty, the said railroad company had neither the legal nor the possessory right to the land above described and mentioned in said treaty.

3rd. The said court erred in holding and deciding that on the 21 day of February, A. D. 1867, the lands above described were not, under said treaty, subject to contract between the said railroad company and the said S. N. Simpson, mentioned in said deed from said railroad company.

4th. That said court erred in holding and deciding that on the 10th day of May, A. D. 1867, neither the Missouri River Railroad Company nor Alexander Caldwell had any right, title, or interest in or to the land above described.

5th. That said court erred in holding and deciding that in the month of June, A. D. 1867, when said A. Caldwell assented to the delivery to said S. N. Simpson of the deed from the Missouri River Railroad Company for the land above mentioned, and dated February 21st, A. D. 1867, neither the said railroad company nor A. Caldwell had
277 any title to the lands in said treaty mentioned.

issues of the case, and this presumption will hold unless the contrary clearly appears. When the court finds the rental value from the time when the pl'ff's title was perfected, at a certain sum, it is a fair presumption, and not inconsistent with the language used, that it was from that time till the suit was brought. To construe it as running up to the time of the judgment, is to infer that the court erred, without a certain ascertainment of that fact from the record.

We have examined the whole record and expressed our views upon a few of the errors alleged, and have found no sufficient cause for setting aside the judgment. It is affirmed.

All the justices concurring.

271 And thereupon, to wit, on the 22d day of December, A. D. 1871, pursuant to the order and judgment of said court above set forth, the following mandate of said supreme court was issued to the said court below, to wit, the district court of the 1st judicial district, sitting in and for the county of Leavenworth and State of Kansas, which said mandate is in words and figures as follows, to wit:

272 SUPREME COURT,
The State of Kansas, ss:

To the district court within and for the 1st judicial district, Leavenworth County, Kansas, greeting:

Whereas in a certain civil action lately pending before you, wherein Carlos S. Greeley et als. were plaintiffs and William A. Simpson et als. were defendants, a judgment was rendered by you in favor of the said Carlos S. Greeley et als. On a transcript of which judgment and record said William A. Simpson et als. prosecuted a petition in error in the supreme court within and for the State of Kansas;

And whereas at the July term of said supreme court, A. D. 1871, on consideration of the said petition in error, it was ordered and adjudged by the said supreme court that the said judgment of the court below be affirmed with costs:

You are therefore commanded that, without delay, you cause execution to be had of the said judgment of the supreme court, according to law, the said petition in error to the contrary notwitstanding.

Witness my hand and the seal of said supreme court, affixed at my office in the city of Topeka, on the 22d day of December, A. D. 1871.

[L. S.] A. HAMMATT, *Clerk.*

273 THE STATE OF KANSAS,
The Supreme Court, ss:

I, Abram Hammatt, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true, full, and correct transcript of the petition in error, transcript of the record of the district court, (as exhibits thereto attached,) journal entries, orders, and judgments, and all proceedings had in said supreme court, or by authority thereof, in said above-entitled cause, as appears of record in my office.

As witness my hand and official seal hereto attached this thirtieth day of December, A. D. 1871.

[SEAL.] A. HAMMATT,
Clerk Supreme Court, State of Kansas.

274 Supreme Court of the United States, of December term, in the year of our Lord one thousand eight hundred and seventy-two.

WILLIAM A. SIMPSON, PLAINTIFF IN ERROR,
vs.
C. S. GREELEY, S. M. EDGELL, WILLIAM M. McPherson, Robert E. Carr, Edward Miller, Matthew Baird, R. M. Shoemaker, and J. W. Kinney, partners as Shoemaker, Miller & Co., David Ackers, William R. Smith, George Arbold, H. Johnston, Andrew Barrett, N. V. Excendine, Joseph Leon, J. H. Cochran, defendants in error.

Afterwards, to wit, on the first Monday of December, in the same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said William A. Simpson, by W. W. Nevison, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit:

1st. The supreme court of the State of Kansas erred in holding
275 and deciding that on the 21st day of February, A. D. 1867, neither the Missouri River Railroad Company, nor A. Caldwell, nor the assignees of said railroad company, under or by virtue of a treaty concluded on the 4th day of July, A. D. 1866, between the United States and the Delaware tribe of Indians, and ratified on the 10th day of August, 1866, or any acts done under the same prior to said 21st day of February, 1867, had any right or interest in the following-described land, the subject of the action aforesaid, to wit: The fractional part of section 34, township 12, range 20, lying north of the Kansas River; and the south fractional half of section 27, township 12, range 20; and northeast fractional quarter, and the east half of the northwest quarter section 27, township 12, range 20; and the east half of southeast quarter of section 22, township 12, range 20; and the west fractional half of the northwest quarter of section 26, township 12, range 20; and the south half of the northeast quarter of the northwest quarter, and the south fractional part of the east half of the northwest quarter of section 26, township 12, range 20; containing $644\frac{22}{100}$ acres, all in the county of Leavenworth, State of Kansas.

276 2nd. That said court erred in holding and deciding that on the 21st day of February, A. D. 1867, under said treaty, the said railroad company had neither the legal nor the possessory right to the land above described and mentioned in said treaty.

3rd. The said court erred in holding and deciding that on the 21 day of February, A. D. 1867, the lands above described were not, under said treaty, subject to contract between the said railroad company and the said S. N. Simpson, mentioned in said deed from said railroad company.

4th. That said court erred in holding and deciding that on the 10th day of May, A. D. 1867, neither the Missouri River Railroad Company nor Alexander Caldwell had any right, title, or interest in or to the land above described.

5th. That said court erred in holding and deciding that in the month of June, A. D. 1867, when said A. Caldwell assented to the delivery to said S. N. Simpson of the deed from the Missouri River Railroad Company for the land above mentioned, and dated February 21st, A. D. 1867, neither the said railroad company nor A. Caldwell had
277 any title to the lands in said treaty mentioned.

6th. That the said court erred in concluding and deciding that Shoemaker, Miller & Co. were entitled to the possession of the lands above described.

7th. That said court erred in holding and deciding that said Shoemaker, Miller & Co. were entitled to a judgment against said William A. Simpson for the sum of $4,300, or for any sum.

8th. That said court erred in holding and deciding that the said Shoemaker, Miller & Co. were entitled to the possession of the land in the first assignment of error herein described.

9th. That said court erred in holding and deciding that there was no consideration for the deed from the Missouri River Railroad Company to S. N. Simpson, and the contract between said Simpson & said Missouri River Railroad Co. for the land above described, which said deed and contract are dated February 21st, A. D. 1867.

278 10th. That said court erred in holding that at the time when the said deed and contract dated February 21st, A. D. 1867, was delivered by John G. Pratt to the said S. N. Simpson, that neither the said Missouri River Railroad Company nor A. Caldwell had any title or interest in or to said land, the subject of this action.

11th. That said court erred in holding that the said deed and contract dated February 21st, A. D. 1867, did not by the terms thereof convey to said S. N. Simpson the title to said land afterward acquired by said Missouri River Railroad Company and A. Caldwell, and that such after-acquired title did not enure to said S. N. Simpson under said deed and contract by the terms thereof.

12th. That the said court erred in holding and deciding that the consideration of the said deed of the lands in dispute from the said Missouri River Railroad Company to said S. N. Simpson, dated February 21st, 1867, and the said contract of the same date between the

279 said railroad company and the said S. N. Simpson, referred to in said deed, was vicious and illegal.

And the said William A. Simpson prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment.

W. W. NEVISON &
E. V. BANKS,
Att'ys for Plaintiff.

(Indorsed:) Sup. Ct U. S., 1872, Dec. term, No. 510. Simpson vs. Greeley & al. Assignment of error. Filed 29th November, 1872.

(Indorsement on cover:) No. 291. William A. Simpson, plaintiff in error, vs. C. S. Greeley, Wm M. McPherson, S. M. Edgall, E. Miller, M. Baird, R. M. Shoemaker, & J. W. Kinney, partners as Shoemaker, Miller & Co., D. Ackers, W. R. Smith, Geo. Arbold, H. Johnson, A. Barrett, A. V. Excendine, J. Leon, & J. H. Cochran. Kansas sup. ct. Filed 29th November, 1872.

In the Supreme Court of the United States.

December Term, 1873.

WILLIAM A. SIMPSON, Plaintiff in Error,

VS.

C. S. GREELEY, S. M. EDGELL, WILLIAM M. McPHERSON, ROBERT E. CARR, EDWARD MILLER, MATTHEW BAIRD, R. W. SHOEMAKER and J. W. KENNEY, Partners as SHOEMAKER, MILLER & CO., DAVID ACKERS, W. R. SMITH, GEO. ARBOLD, H. JOHNSON, ANDREW BARRETT, N. V. EXCENDINE, JOSEPH LEON and J. H. COCHRAN, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Spirit of Kansas Print.

In the Supreme Court of the United States.

DECEMBER TERM, 1873.

WILLIAM A. SIMPSON, Plaintiff in Error,

VS.

C. S. GREELEY, S. M. EDGELL, WILLIAM M. McPHERSON, ROBERT E. CARR, EDWARD MILLER, MATTHEW BAIRD, R. W. SHOEMAKER and J. W. KENNEY, Partners as SHOEMAKER, MILLER & CO., DAVID ACKERS, W. R. SMITH, GEO. ARBOLD, H. JOHNSON, ANDREW BARRETT, N. V. EXCENDINE, JOSEPH LEON and J. H. COCHRAN, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was instituted in the District Court of the State of Kansas by the Defendants in Error against the Plaintiff in Error and others, to recover possession of certain lands forming a part of what was once the Delaware Diminished Reserve, and also for rents of said lands, and for timber taken off the same.

The petition of the plaintiffs in said court (defendants in error) in substance alleged that they were partners as Shoemaker, Miller & Co., and that they were seized in fee simple of certain lands in the county of Leavenworth, in the State of Kansas, (describing them) amounting in all to 644 22-100 acres, and were entitled to the possession thereof, and that the defendant (the pl'ff. in error and others) unlawfully kept the plaintiffs out of possession thereof, and had so kept them out of possession from the 21st day of February, 1867, and had cut and carried away a large amount of timber, and prayed judgment for possession and damages in the sum of ten thousand dollars.

Which petition was filed Dec. 9, 1868. (See Transcript of Record, page 21.)

Defendants filed answer denying all the allegations of the petition, except their possession and the time they had retained possession.

And as another ground of defence, alleging that the land in question was a part of the land mentioned in the treaty between the United States and the Delaware tribe of Indians, concluded July 4, 1866, and proclaimed August 10, 1866, and was a parcel of the lands mentioned in the 2d article of said treaty as the remaining part of said Reservation, and being a part of the lands mentioned in said treaty which the Secretary of the Interior was by said treaty authorized to sell. That none of the above mentioned tracts were any of the

mill reservation, or blacksmith shop tracts mentioned in said treaty.

Answer also averred that the Secretary of the Interior did, within thirty days after the ratification of said treaty, give the Missouri River Railroad Company notice that he was authorized to contract with them, or others, for the sale of the lands mentioned in the seventh article of said treaty on the terms therein named, and indicating the approximate quantity thereof.

And the defendants also averred that said Company duly received said notice at its usual place of business in Kansas. That within twenty days after receiving such notice the said Company did elect to make purchase of said land under said treaty, and filed its bond with approved security in double the amount proposed to be paid for the whole of said land, guaranteeing that it would purchase all of said lands to be sold under said treaty, and pay therefor according to the terms thereof.

That on the 31st day of August, 1866, the United States, by James Harlan Secretary of the Interior, and the said Railroad Company, by Leonard T. Smith, its President and Agent duly authorized, made and executed an agreement for the purchase of said land, a copy of which is fully set forth and attached to the answer of said defendants and made a part thereof. (See Transcript of Record pages 22, 23 and 24.)

The said defendants further averred that under

and in pursuance of said treaty and written agreement, the said Railroad Company duly paid for said land, and that on the 21st day of February, A. D. 1867, the said Railroad Company, by L. T. Smith, its President and Agent duly authorized, made, executed and delivered to one Samuel N. Simpson its written instrument or deed of that date, a copy of which is attached to said answer and made a part thereof; which said deed among other things contained the following provision, to-wit: "do hereby devise, release, and forever quit claim to the Samuel N. Simpson,his heirs and assigns forever,all the right, title and interest acquired by the Missouri River Railroad Company, under treaty of July 4, 1866, or by Len. T. Smith as its President, or *that they may hereafter acquire under or by virtue of said treaty, of the following described lands, to-wit:* (land described in petition) (See Transcript of Record pages 24 and 25) and thereby conveyed the lands described in plaintiff's petition to the said Samuel N. Simpson, and that said deed was duly recorded in Leavenworth county May 24, 1867.

The defendants in their answer also averred that on the 25th day of February, 1867, the day the deed aforesaid was executed, and at the same time the said Railroad Company, by L. T. Smith, its President and Agent duly authorized and empowered, and A. Caldwell and the said Samuel N. Simpson, by name of S. N. Simpson, made and executed their certain written instrument of that

date and sealed with the seal of said company, of which written instrument a copy is attached to and made a part of said answer, being the written instrument mentioned in said deed. (See Transcript of Record p 26.

The defendants in said answer also averred that on the 10th day of May, 1867, the Union Pacific Railroad Company E. D., R. M. Shoemaker, John D. Perry, and the plaintiffs, R. M. Shoemaker, Miller & Co., by E. M. Bartholow, their agent duly authorized, made and executed their written instrument, a copy of which is attached to said answer and made a part thereof. (See Transcript of Record p.p. 27 and 28.)

The said defendants in said answer also averred that said instrument was also executed by William A. Simpson, Simpson Brothers, S. N. Simpson and H. M. Simpson. Also averred that said S. N. Simpson, on the 28th day of May, 1867, deeded said land to the said William A. Simpson, a copy of which said deed is attached to said answer and made a part thereof. (See Transcript of Record p. 28.)

In said answer the defendants below also averred that S. N. Simpson then delivered said deed to said W. A. Simpson, and that said W. A. Simpson on the 31st day of May, 1867, left said deed for record in the office of the Register of Deeds in and for Leavenworth county, Kansas, and that the same was then duly recorded in said office. And that the said S. N. Simpson immediately

after the execution of said deed by the Missouri River Railroad Company, to-wit: on the 21st day of February A. D. 1867, went into possession of said premises under said conveyances, and made large and valuable improvements thereon, and continued in possession thereof until the sale thereof by him to said William A. Simpson; and that the said William A. Simpson, immediately after the execution of said deed by said S. N. Simpson, to-wit: on the 28th day of May, 1867, went into possession of said premises under said deed, and has ever since, after and until the filing of said answer, by himself and tenants under him, been in possession thereof and has made valuable improvements thereon.

That said W. A. Simpson made said purchase, took said deed and went into possession of said premises without notice, actual or constructive, of any transfer of any interest in said land by said Railroad Company, other than said transfer to said S. N. Simpson, or of any ownership or rights in said land, or of any interest therein, except said S. N. Simpson's interest therein.

That the several Delaware Indians, who at the date of said treaty occupied said land, did not elect to become citizens, but elected to remain members of the said Delaware tribe of Indians, and removed from and gave up possession of said land.

And defendants further averred in said answer that the improvements on said lands, at the time

said treaty was made, were, pursuant thereto, appraised at the sum amounting in the aggregate to the sum of $1,400, and that before the commencement of said action said W. A. Simpson offered to pay, and tendered the amount of said improvements as appraised, to the Missouri River Railroad Company, and to said A. Caldwell, and then brought the same into court and tendered the same to them or whomsoever the court should decide entitled thereto.

That on the 28th day of October, 1867, the plaintiffs in the court below, and other persons, fraudulently combined and confederated together to cheat and defraud said W. A. Simpson out of said lands, and without any authority, power or right, induced, obtained and procured the United States, its officers and Agents, to make and deliver to and in favor of said Caldwell, as assignee of said Railroad Company, a patent, whereby the United States conveyed to said Caldwell, his heirs and assigns, in fee simple forever, the said lands described in plaintiff's petition, and other lands, which included all the lands deeded and conveyed by said Railroad Company to said S. N. Simpson.

That said Caldwell was not the assignee of said Railroad Company under any valid assignment good against said S. N. Simpson or said W. A. Simpson. That a copy of said patent,from the commencement thereof to the description of said lands, is attached to said answer and made a part thereof. (See Transcript of Record p 30.)

The defendants in said answer also averred that said A. Caldwell and the plaintiffs below so procured said patent to be made and issued to said Caldwell for the purpose of fraudulently preventing the Missouri River Railroad Company from acquiring the legal title to said lands, for the purpose of defeating the right of said W. A. Simpson and S. N. Simpson therein, and for the purpose of cheating and defrauding said Simpson out of said several tracts of land. (See Transcript of Record p 30.)

That the defendants in said answer also averred that on the 28th day of March, 1868, while said W. A. Simpson was in possession of the several tracts of land, said Caldwell and his wife by deed pretended to convey to said Shoemaker, Miller & Co., the land described in their petition, fraudulently, for the purpose of cheating and defrauding said W. A. Simpson out of said land. That said Shoemaker, Miller & Co., plaintiffs in said court, took said deed with notice and full knowledge of the right of said W. A. Simpson. That said plaintiffs below paid no consideration for said land, but confederated with said Caldwell to cheat and defraud said W. A. Simpson out of said land, and with the understanding that if they should fail to recover said land from said Simpson, they should pay said Caldwell no consideration for the same.

That the said Caldwell so made and executed said deed for the purpose of putting the legal title

of said lands out of himself into said plaintiffs below, (Shoemaker, Miller & Co.,) so that they could recover said lands from said Simpson for the purpose of getting rid of the effect of said deed to said S. N. Simpson and the contract mentioned therein above, and filed in said answer first after said deed. All of which facts plaintiffs (below) well knew when said Caldwell made said deed, and had full notice thereof.

That said plaintiffs (below) fraudulently set up said deed, and claim title to said lands under the same by virtue thereof, and fraudulently claim an estate and interest in said lands adverse to the defendants, and praying in said answer judgment against said plaintiffs and each of them. (See Transcript of Record p 31.)

The plaintiffs in the said District Court filed their reply to said answer, which among other things averred as follows: Admitted that the lands described in said petition were a part of the lands described in the treaty mentioned in said answer as concluded July 4, 1866, and that they were not any part of the mill reservation or blacksmith's shop. That the Secretary of the Interior on the 11th day of August, 1866, gave the notice specified in said answer, and that the Missouri River Railroad filed the bond as in said answer alleged. That on the 31st day of August, 1866, the written instrument was made as in said answer alleged, but denied that at any time said Railroad Company made, executed, sealed or de-

livered to said S. N. Simpson the said deed in said answer described, and denied that L. T. Smith, as President of said Railroad Company or otherwise, was the Agent of said Company to execute said written instrument or deed, or was authorized or empowered to execute the same, or that the said Railroad Company on the 21st day of February, 1867, or at any other time, made or executed the instrument in said answer described as having been on that day made and executed by L. T. Smith, President and Agent, and Alexander Caldwell, by name A. Caldwell, Vice-President, and S. N. Simpson, and denied that said Smith was the Agent of said Railroad Company to execute said instrument, or that he was by said Company authorized or empowered in any way to execute the same, and denied that said Alexander Caldwell was ever authorized by said Railroad Company to execute the same, and denied that the written instrument, alleged in said answer to have been executed on the 10th day of May, 1867, was executed by the plaintiffs (below) or either of them, or that said E. M. Bartholow was the agent of the plaintiffs, or either of them, to execute said written instrument. And denied that said instrument had any connection with reference to the subject matter of said action, but related wholly to other matters; and alleged that on the 10th day of May, 1867, the rights of the Indians to said land had not been extinguished.

Admitted the execution of the instrument al-

leged to have been made on the 28th day of May, 1867, but alleged that the same was executed to said W. A. Simpson, a brother of S. N. Simpson, without any consideration, and in collusion with his said brother for the purpose of complicating the title to said land, and embarrassing the plaintiffs in their recovery in said action.

Admit the issuing of the patent in said answer described to Alexander Caldwell, and the making and delivering of said deed in answer described by A. Caldwell and wife to plaintiffs.

Alleging that at the time of making the deed of the Missouri River Railroad Company to S. N. Simpson, in answer set forth there was no good or valuable consideration passing from said Simpson to said Company, and that said deed was without consideration, all of which said W. A. Simpson at the date of said deed well knew, and that at the time of making of the instrument of date, 21st of February, 1867, referred to and specified in said answer as having been signed by L. T. Smith and A. Caldwell, there was no good or valuable consideration passing from said Simpson to said Railroad Company, or to said Smith or Caldwell; that it was made without any consideration whatever, all of which said W. A. Simpson well knew.

The plaintiffs in their reply further alleged that on the 29th day of October, 1866, said A. Caldwell and said plaintiffs made and executed their written instrument, of which a copy is attached to

said reply and made a part thereof, marked "Exhibit A," (See Transcript of Record p 35,) that the lands in the petition mentioned are part of the lands in said last mentioned written instrument described, and were selected by said plaintiffs within ninety days from the date of the said written instrument,of the making of which instrument and the existence of the same, and of the selection of said land as aforesaid, said S. N. Simpson and W. A. Simpson had full notice at the time of the execution of the instrument dated Feb. 21, 1867.

That the said deed of conveyance from said Caldwell and wife to said plaintiffs was made, executed and delivered in pursuance of the said instrument dated October 29, 1866. That in pursuance of said instrument, and upon the execution and delivery of the deed from said Caldwell and wife to the plaintiffs, they paid the full price and value of said land to said Caldwell according to the terms of said written instrument, to-wit: $20 per acre for all of said lands.

That at the date of said last mentioned instrument, to-wit: October 29, 1866, none of transactions mentioned in said second ground of defense, participated in by said S. N. Simpson and W. A. Simpson, L. T. Smith and A. Caldwell, as alleged, had occurred.

That the possession of said land by said Simpson was wrongful and unlawful; that said S. N. Simpson took possession thereof before the Indians to whom the same had been allotted had

elected, under treaty of July 4, 1866, to remove, and before the improvements in the answer mentioned were appraised.

The plaintiffs (below) in said reply denied all knowledge of the existence of said deed of February 21st, 1867, or of the other instrument of that date, and denied that the Missouri River Railroad Company, L. T. Smith or A. Caldwell, had any right or interest in said lands at that date except the right to purchase the same according to the terms of said treaty of 1866, all of which said S. N. Simpson well knew, and denied each allegation of said answer, not in said reply specifically admitted, except that said Simpsons were in the possession of said lands at the time of commencement of said action.

And alleged that on the 21st day of February, 1867, and for a long time thereafter, the said lands were held and posessed by members of said tribe, under allottment made under said treaty. (See Transcript of Record, pp 32, 33 and 34.)

At the September term, 1870, of the District Court in and for said County of Leavenworth, Kansas, said action came on for a second trial and the parties thereto waived a jury and agreed to try the case to the Court, with the request, by the parties, that the Court find the facts and law of the case separately,(See Transcript of Record p 37.) which practice is authorized by the laws of Kansas. (See General Statutes of Kansas 1868, p 684, Secs. 289, 290.) Under the laws of said State the

defendants may set forth in their answer as many grounds of defense or relief etc. as they may have, whether denominated legal, or equitable, or both. (See General Statutes of Kansas, 1868, p 648, Sec. 84.) The said Court after hearing the evidence and argument of counsel, among other things, found the following:

That, "On the 26th day of October, 1867, the United States issued and delivered to Alexander Caldwell a patent for 92,598 33-100 acres of land, including the land in controversy in this suit, which patented lands are the lands authorized to be sold by the provisions of the treaty concluded July 4th, 1866, between the United States and the Delaware tribe of Indians, and which patent was duly recorded in the office of the Register of Deeds of the County of Leavenworth in this State on the 1st day of April, A. D. 1868.

The Court further found that said patent among other things contained the following: "And whereas it appears from a return dated October 17th, 1867, from the Secretary of the Interior to the Commissioner of the General Land Office, that the 'Missouri River Railroad Company has through the Assignee, Alexander Caldwell, complied with the terms and conditions of the contract made by said company with the late Secretary of the Interior, Hon. James Harlan, for the purchase of the Delaware Diminished Reserve in Kansas, under the provisions of the aforesaid treaty concluded with the Delaware Indians, July 4th, 1866.'

(In which patent the United States conveyed the land above mentioned to "Alexander Caldwell, Assignee of the Missouri River Railroad Company, and to his heirs and assigns forever.')

2d, That "said railroad company did not pay for said lands or any part thereof, but said Caldwell did pay for all of said lands, and improvements thereon, about ten days before said patent was issued, and the money to pay therefor was furnished by said Caldwell and his associates, and by some of them furnished in the following proportions, to-wit: By said Caldwell, one thirteenth and one-third of a thirteenth; by Leonard T. Smith, two-thirteenths and one-third of a thirteenth; by Lucien Scott, one-thirteenth; by Tho's. A. Scott, one-thirteenth; by O. A. Hart, one-fourth of three-thirteenths; by C. H. Peck, one-fourth of three-thirteenths; by George R. Taylor, one-fourth of three-thirteenths; by Daniel R. Garrison, one-fourth of three-thirteenths; by M. H. Insley, one-thirteenth; by John D. Perry, one-twenty-sixth; by Thomas L. Price, one twenty-sixth; and by R. M. Shoemaker, one-twenty-sixth; George Partridge, of St. Louis, and James Duffy, of Pennsylvania, were also stockholders. There were thirteen shares in all.' (Transcript of Record, p 132.)

3d, "Of the parties who furnished the money as aforesaid, with which to pay for said lands, the following were officers and directors of said Railroad Company at the time, and also at the time

said patent was issued, and until January, 1868, namely; L. T. Smith, Alexander Caldwell, Lucien Scott, O. A. Hart, C. H. Peck, D. R. Garrison, George R. Taylor and M. H. Insley, and from about the month of January, 1866, until the present time, said Smith has been president, and the said Caldwell vice-president of said company. The board of directors of said company consisted of eleven members.' (See Tsanscript of Record, p 132.)

4th, 'On the 26th day of December, 1867, the said Caldwell and wife executed and delivered to the plaintiffs a deed of 8,022,27. acres of land, including the lands for the recovery of which this suit is brought, and being a part and parcel of the land described in the patent aforesaid." (See Transcript of Record, p 132.)

The Court further found that at the time Shoemaker, Miller & Co. (plaintiffs in said Court) took the deed from Caldwell and wife,(December 26th, 1867,) they, the plaintiffs, knew that said W. A. Simpson was in posession of the premises in controversy in said action by his tenants, and that the said Simpson claimed to own the same by a title which is hereafter described, and also knew that said Caldwell was a director of said railroad at the time he paid for said patented lands, and took the patent therefor and at the time they took their deed from said Caldwell and wife.

That the rental value of the land for which said suit was brought since December 26th, 1867. (See Transcript of Record, p 132.)

The Court further found that S. N. Simpson was using his influence to induce said Indians not to sign said treaty, and that to induce said Simpson "to withdraw his opposition to the registration of the Indians, and to desist from persuading them not to register, said Caldwell and Smith promised said Simpson that said Railroad Company would give to him a section of land authorized to be sold by said treaty,and to include improvements thereon, which offer said Simpson accepted. "Said Caldwell,Smith and S. N. Simpson went to the City of Leavenworth, Kan.,and Smith, pretending to act for and on behalf of said Railroad Company, signed the written instrument (deed) and attached the corporate seal of said Company thereto, and dated February 21st, 1867, and that the same was duly recorded in the office of the Register of Deeds, May 24th, 1867. A copy of the deed from said Railroad Company to said S. N. Simpson is fully set out in the finding of said Court. (See Transcript of Record, p 132.)

That said deed, as found by said court, among other things, cantained the following: "Know all men by these presents, that the Missouri River Railroad Company, in consideration of one dollar and other valuable considerations to it paid by Samuel N. Simpson, of Lawrence, Kansas, the receipt whereof is hereby acknowledged, do hereby convey, release, remise, and forever quit claim to the said Samuel N. Simpson, his heirs and assigns forever, all the right, title and interest acquired

by the Missouri River Railroad Company under treaty of July 4, 1866, or by Len. T. Smith, as its President, or that they may hereafter acquire under or by virtue of said treaty, of the following described lands, to-wit:" (here follows description of lands in controversy,) being the lands of the Delaware Diminished Reserve in Leavenworth county, it being understood that if there are any improvements on the above described lands to be paid for under the treaty before mentioned, the said Simpson shall pay the same, and reference is also hereby made to an agreement of the parties, of this date, which qualifiedly controls this deed, and all in law or in equity of, in and to said premises, together with all privileges and appurtenances to the same belonging, and all rents, issues and profits thereof; to have and to hold the same to the only proper use of the said S. N. Simpson, his heirs and assigns forever. In witness whereof, the said Missouri River Railroad Company, by its President, Len. T. Smith, has hereunto set its hand and seal this twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-seven. Missouri River Railroad Company, by L. T. Smith, President."

Which deed was duly acknowledged and recorded. (See Transcript of Record, pp. 133, 134 and 135.

The court also found that at the time of the making of the said deed above mentioned, "the said Smith and Caldwell, pretending and assuming

to act in the capacity and manner appearing and shown therein, signed the written instrument following, and attached the corporate seal of said Company thereto, which instrument also bears date February 21st, 1867, and duly recorded March 31st, 1868," as follow:

"The Missouri River Railroad Company has, for a valuable consideration, this day made a deed for the following described lands:" (the lands in controversy,) "to the said S. N. Simpson, and it is agreed by said Railroad Company and the said Simpson, that if said Company shall obtain a patent for any or all of said land described in said deed, they agreeing to use the same diligence to obtain title to the lands conveyed by said Company that is used by said Company to obtain title to other lands purchased by said Company under the contract of purchase of said Delaware Diminished Reserve, Kansas aforesaid, pursuant to the terms of the treaty of July 4th, 1866, the said Company will allow the said Simpson to select other of said lands, equal in amount to the number of acres mentioned in said deed for which the Company shall not acquire title, and the said Company will convey the same by good and valid deed to him; in the event of the failure of the title, the deed this day made of the lands to which said Company has or shall obtain no title shall be void; and the said Company agree to give said Simpson a choice of any lands they shall acquire the title to, not then sold under such contract of purchase,

and to convey such lands in lieu of and to an equal amount to the lands described in the deed of this date to which the title of the Company shall fail, and the said Leonard T. Smith, president, and Alexander Caldwell, vice-president of the said company, for and in consideration of the premises aforesaid, for themselves, jointly and severally covenant and agree with the said Simpson that this agreement shall be well and truly kept by said Railroad Company," which contract was dated February 21st, 1867, and signed "Missouri River Railroad Company,

"By L. T. SMITH, President,

"A. CALDWELL, Vice-President,

"S. N. SIMPSON."

(See Transcript of Record, pp 135, 136.)

The agreement made between the United States and said Railroad Company, on which said contracts and deed were based, for all of said lands, is as follows, to-wit:

"This agreement, made and entered into on the thirty-first day of August, 1866, between James Harlan, Secretary of the Interior, for and in behalf of the United States of America, of the first part, and the Missouri River Railroad Company, a corporation existing in the State of Kansas by the laws thereof, of the second part, witnesseth: Whereas, by the second article of the treaty concluded at the Delaware Agency, Kansas, on the fourth day of July last past, between said United States and the Delaware tribe of Indians, it is

provided, "That the Secretary of the Interior shall be, and he is, authorized to sell to said Missouri River Railroad Company, or other responsible party or parties, in a body, all the remaining part of said reservation, being the lands conveyed to said Delaware Indians in pursuance of the provisions of the supplemental treaty of September 24th, 1829, and all other lands owned by the said tribe in the State of Kansas, not previously disposed of, except as hereinafter provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements: And whereas, said Secretary, within thirty days after the ratification of said treaty, gave the notice required by the seventh article thereof to said Company: And

Whereas, within twenty days after receiving said notice, said Company elected to make the purchase of said lands at two dollars and fifty cents per acre without improvements, by filing with the said Secretary their bond, with approved security in double the amount proposed to be paid by them for the whole of said lands, and guaranteeing that they would purchase all of the lands to be sold under the provisions of said treaty, and that they would pay for them in accordance with the terms thereof: And

"Whereas, said Company did, by resolution, authorize and direct Leonard T. Smith, president of said Company, to file said bond, and to do such other acts as may be necessary to secure said lands, as by copy of said resolution, certified by

the Secretary and the seal of said Company, and on file in the Department of the Interior, fully and at large appears; and there being no other offer for said lands:

"Now therefore, said party of the first part, in consideration of the premises and of the sum of money hereinafter mentioned to be paid by said party of the second part, does hereby agree to sell to said party of the second part all said lands provided to be sold by said treaty, at and for the sum of two dollars and fifty cents per acre, exclusive of all improvements, and subject to all the terms, exceptions, conditions, and limitations in said treaty mentioned; and said party of the second part, in consideration of the premises, doth hereby agree to pay within sixty days from the date of these presents, to the Secretary of the Interior, in trust for the Delawares, in lawful money of the United States, the price and value of all of the unallotted lands whereof mention is made in said treaty, at the rate of two dollars and fifty cents per acre; and also, the appraised value of the improvements thereon, to be ascertained in the mode provided for in said treaty, excepting therefrom the mill reservation and the quarter section upon which the Council House and blacksmith shops are built, the use of which shall be retained until the final removal of the Delawares, and for which payment shall not be required from the said party of the second part until possession is delivered, and from time to time thereafter as often as the

Secretary of the Interior shall notify the said party of the second part that ten thousand acres or more of said lands have been vacated by said Indians, within three months thereafter said party of the second part agrees to pay to the Secretary of the Interior, in trust for the said Indians, the price of said lands so vacated, at the rate of two dollars and fifty cents per acre thereof; and, also the appraised value of the improvements, and so on until all are paid for according to the true intent and meaning of said treaty; and, as lands shall be paid for, patents therefor, conveying the same in fee simple, shall be from time to time issued to said party of the second part or its assigns by the President of the United States.

In witness whereof said James Harlan, Secretary as aforesaid, hereunto sets his hand and the seal of said Department, and the said Leonard T. Smith, president of the Missouri River Railroad Company, and on behalf of said Company, and in pursuance of the power upon him thereunto conferred, sets his hand and seal the day and year first aforesaid.

(SEAL) (Signed) JAMES HARLAN,
Secretary of the Interior.

(SEAL) (Signed) LEONARD T. SMITH,
President of Missouri River Railroad Company.

(See Transcript of Record, pp 23, 24.)

The Court in its 10th findings of fact (See Transcript of Record, p 137) found, that the deed from said Railroad Company to said S. N. Simpson for

the land in controversy and the contract made between the same parties were deposited by the parties with Robert Crozier, to be delivered by him to said S. N. Simpson in case there should no longer be any difficulty in proceeding with the registration of said Indians, and therefor said Simpson abondoned all further interference and opposition to the registration of the said Indians, and the next day returned to his home at Lawrence, in Kansas, and thus thereafter there was no difficulty in proceeding with the registration aforesaid, that not long afterwards said Crozier delivered said instruments to John E. Pratt, who, in the forepart of May, 1867, delivered them to the said S. N. Simpson, and afterwards, and sometime in June, 1867, the said Caldwell assented to such delivering to said S. N. Simpson.

11th, That said L. T. Smith and A. Caldwell had never been authorized by said Railroad Company, or its Board of Directors, to sell or dispose of said lands, or make the instrument dated Feb. 21st, 1867, or either of them, nor were such acts afterwards ratified by said Railroad Company.

12th, That the nominal consideration of one dollar, mentioned in the first of said instruments, (the deed,) dated February 21st, 1867, was never paid, and there was no consideration of any sort received by any person for said instruments, "save and except only such consideration, if any, as the facts and circumstances inducing their execution, as already stated, and the agreement in the first

of said instruments, that said Simpson should pay for whatever improvements there might be upon said premises, established and made out."

13th, That "the lands described in the instrument of date February 21st, 1867, are the lands for which this suit is brought, and there were thereon at that time certain valuable improvements which had been made by the Indians prior to the conclusion of said treaty." (July 4th, 1866.)

14th, That "on the 28th day of May, 1867, said S. N. Simpson deeded the land in controversy to said W. A. Simpson, which deed was recorded in said Register's office May 31st, 1867." (See Transcript of Record p 138.)

15th, On the execution of the instruments aforesaid, and immediately thereafter, said S. N. Simpson entered upon and held possession of said premises, and continued in possession of said premises until the sale to said W. A. Simpson, who on the receipt of the deed from said S. N. Simpson went into possession of said premises, and continued in possession thereof to the time of the trial by said court, (Nov., 1870,) and while thus in possession made valuable improvements in the way of clearing, fencing and cultivating said lands, and erecting thereon two or three not very valuable buildings. (See Transcript of Record p 138.)

16th, "In the fall of 1867 Samuel N. Simpson, acting for the defendant, William A. Simpson, tendered the said L. T. Smith, for the said Railroad Company, and also to said A. Caldwell, for,

and on account of the improvements on the said premises, which said Samuel N. Simpson was to pay for according to the terms of said instrument, dated February 21st, 1867, the sum of fourteen hundred dollars, in lawful money, but said Smith and Caldwell refused to receive the same, and did and would not accept the same. (See Transcript of Record p 140.)

CONCLUSION OF LAW BY THE COURT.

The court, as conclusions of law in the case, found:

1st, "The defendants are not entitled to any relief on the claim or right and title set up and asserted by them." To which conclusions of law the defendants excepted.

2d, "The plaintiffs have the legal title to, and are entitled to, the possession of the lands described in their petition." To which conclusion of law the defendants duly excepted.

The Court found for damages for plaintiffs in said action, and proceeded to render judgment according to above findings.

(See Transcript of Record, p 140.)

The defendants then filed in said Court their motion for new trial, assignging numerous grounds therefor, which motion the Court overruled, and thereupon said action was taken to the Supreme Court of Kansas on error. (See Transcript of Record, pp 141, 142, 143, 144 and 145.)

ABSTRACT OF OPINION OF THE SUPREME COURT OF KANSAS.

After a statement of the facts in the case the Court decided the following points:

1st, That the deed purporting to convey the land from the Railroad Company to S. N. Simpson was inoperative for want of authority in the persons who pretended to act for the said Company in making it, and therefore the deed did not bind the Railroad Company. (See Transcript of Record, p 148.)

2d, That Caldwell having by the contract of the same date recited over his own signature that the Railroad Company had made such deed, and Simpson having acted upon the faith of such recital, Caldwell was estopped to deny the authority of Smith to execute the deed. (See Transcript of Record, p 149.)

3d, That the defendants in error having taken their title with full notice of Simpson's claim to the lands, had no greater rights than Caldwell would have had if he had not conveyed. (See Transcript of Record, p 149.)

4th, That said estoppel was not one such as would create an estate or run with the land. That it grew out of the recitals of the bonds signed by Caldwell, and not out of the deed executed by Smith as president of the Railroad Company. (See Transcript of Record, p 149.)

5th, That the deed was not such a deed as works an estoppel against a title subsequently acquired by the grantor, being at most a quit claim deed, the terms used being convey, remise, release and forever quit claim. (See Transcript of Record p 149.)

6th, That the deed from the Railroad Company to Simpson being merely a quit claim deed,did not purport to convey a greater interest than the Company then had in the land, and therefore was not affected by the provisions of Sec. 4, page 354 of the compiled laws of Kansas then in force; and therefore, technically, the deed did not create an estoppel. (See Transcript of Record p 150.)

7th, That the Railroad Company, when the deed was made,had no title or right of possession to the land, and their claim was a mere possibility, and as the court "inclined to think," not coupled with a subsisting interest. (See Transcript of Record pages 150 and 151.)

8th, If such was the character of its claim, the land was not then the subject of contract at all between the parties.

That the plaintiff in error was in no better position than S. N. Simpson, his grantor, and that the court correctly decided that the plaintiffs were entitled to the land.

The Court further says, "this conclusion on the main question in controversy also settles many of the exceptions made on the taking of the evidence." (See Transcript of Record p 151.)

And upon these points of law the Court bases its judgment for defendant in error.

We think that the decision of the Court that the Railroad Company, when the deed was made, had no right, subject to be conveyed by deed, and the judgment founded thereon, were erroneous.

1st. By the law of Kansas, any right to the possession of land, whether legal or equitable, may be set up by the defendant as a bar to an action at law to recover the possession of the property from him. (See Code of Civil Procedure, 94 Gen. Stat., p. 648.

2d. The Railroad Company held by the contract made by the United States on the 31st day of August, 1866, through the Secretary of the Interior with said Company, pursuant to the second article of the treaty between the United States and the Delaware tribe of Indians, concluded July 4th, 1866, (Statutes at Large, vol. 14, p. 795.) Said Company filed its bond, with approved security, pursuant to said treaty. (See Transcript of Record, page 32. For copy of said contract, see allegation in the answer, page 230, Transcript of Record. For admission of same by defendant in error, see Transcript, page 32.)

We claim that the Court erred in holding that the Missouri River Railroad Company had no right to the land subject to be conveyed by deed when the deed to Simpson was made.

The lands provided by the treaty to be sold, were divided into two classes, allotted and unallotted. By the terms of the treaty the Railroad Company was required to pay for the unallotted lands within sixty days from the conclusion of the contract to purchase. (United States Statutes at large vol. 14 p 735 Art. 8.) The contract of purchase was made August 31st, 1866. (Transcript of Record, pp 23 and 24.)

By the terms of said treaty and of said contract the Railroad Company were required to pay for the unallotted lands on or before October 30th, 1866. The title to said lands was not subject to any contingency. It did not depend upon a registry of the Indians. It could not be affected by anything that they might or might not do.

By the terms of article 3rd of the treaty, this is placed beyond dispute.

By that article it is provided that "after it is ascertained by registry what lands will be vacated, there shall be set apart from the lands held in common for each child of Delaware blood, born since the former allotment of land, a quantity of land equal to the amount to which they would have been entitled had they been born before said allotment, provided that selections for children belonging to families whose head may elect to remain, may be made from lands which are to be vacated by those who elect to remove."

The object of these provisions, we think, was to place the children who had been born since the

former allotment in the same financial condition as those born before, and thus do justice between the several members of the tribe.

Section 8 of the treaty provides that the unallotted lands shall be paid for within sixty days after the sale, without reference to the registration of the Indians, or their electing to remove or remain.

By the provisions of article 3, as to allotments for said children, it is manifest that it was not the intention of the contracting parties to reserve from the sale any portion of the unallotted lands for the children who were to remove, for it might be, and in fact would have been a reservation, to take effect after the land was sold and paid for.

Nor is it to be believed that they intended to reserve land from sale for any Indians who were to remove.

It was the leading policy of the treaty to sell all the lands of those who were to remove, and to retain land for those who elected to remain and become citizens.

And to retain a parcel of land for each of this class of children, would be in violation of that policy, and would not be that uniform distribution of the benefits of the treaty that the treaty was designed to effect.

The treaty therefore provides that the children who remain shall have an allotment out of the lands vacated by those who remove, and that those children who were to remove, should have an al-

lotment out of the purchase money of land sold, and the allotment made to them was provided to be taken out of that land, for the reason that it was not desired that they should retain land here while residing several hundred miles from it, with their tribe, but it was desired that they should have purchase money equivalent to the price of an allotment.

The Railroad Company having contracted to purchase all the lands of the Delaware Reserve, and given its bond with security therefor, subject only to the rights of individuals to take portions of the allotted lands if they shall sever their connection with their tribe and become citizens, we claim that it thereby acquired an equitable interest in all said lands.

That right to the unallotted land was a full equitable title, without condition or reservation, and subject only to a lien for the purchase money.

That right to the unallotted lands was an equitable title, subject only to the right of such Indians as elected to remain and become citizens, to retain their allotments, and to the right of children born since the allotment, the heads of whose families so elected to remain, to have allotments from lands vacated by those who should remove, and also subject to a lien for purchase money.

There is no finding of the Court nor evidence that the land in dispute belonged to the class of allotted lands. It is true these lands were

improved, but it appears from article 8th (Treaty of July 4th 1866, 14th Statutes at large p 795) that there were improvements upon the unallotted lands. But this does not show that any portion, certainly not that any of the land in suit was allotted land. The Indians were not prohibited from living upon unallotted lands. On the contrary, such land was held by the tribe under the ordinary Indian title under which any member of the tribe was at liberty to take possession of and occupy any such lands not already in the actual possession of another.

But the findings of the Court show that the lands were unallotted lands. The Court found in its 13th findings of fact (See Transcript of Record, p 137,) that, "from the conclusion of the treaty "up to the winter or spring of 1868 the lands in "dispute were occupied by some of the aforesaid "Indians, who had their homes thereon, until the "winter or spring of 1868, at which time they re- "moved therefrom and went to their new homes in "the country south of this State."

This clearly shows that the lands in question were not allotted lands, for by the treaty no allotted lands were to be patented until they were vacated by the Indians, while the unallotted lands were to be paid for and the purchaser entitled to a patent within sixty days after purchase.

These lands were not vacated by the Indians, as appears by the 13th finding of fact. (See Transcript of Record, p 137.)

If they had been allotted lands they could not have been patented while the Indians remained in possession, holding them as allotments.

But even if the lands in dispute were of the class of allotted lands, we should still insist that the Railroad Company on the 21st day of February, 1867, had an assignable interest therein which would pass by deed.

By said treaty it was made the duty of the President to procure the removal of the Indian tribes from the State of Kansas. The Delawares have signified their intention to remove and authorized by said treaty the President to dispose of all their lands in Kansas in a body to said Railroad Company. (See 14th Stat. at Large, p 794, article 2.)

Then follows a proviso by which members of the tribe, who elect so to do, may become citizens of the United States and hold the land before allotted to them.

This is not the case of a sale to be defeated at the election of the vendor; but the lands sold were the property of the Wyandotte tribe, the public domain of the Nation, and the treaty authorizing the sale made by the tribe in its political character and the persons for whose benefit the proviso was made were individuals not owners of the lands nor parties to the sale. The sale is an absolute sale, binding the vendor to allow to individuals who wished it the benefit of that proviso.

The treaty does not contemplate that any considerable number of Indians would elect to remain

in Kansas. To have done so would have frustrated the purpose of the treaty. The tribe had engaged to quit the State of Kansas. It was possible that individual Indians might prefer a different course. A provision was made in the treaty for this possible preference. It does not appear in the findings of the Court that any Indians accepted the proffered alternative. This provision of which it was improbable that any considerable number of Indians would avail themselves, can hardly be said to destroy the title of the Railroad Company to the allotted lands. Besides this we claim that there is no finding of the Court nor evidence that the individual members of the Delaware tribe had not elected whether to dissolve their relations with the tribe, long before February 21st, 1867. This election and the registry provided for by article IX were separate and distinct transactions. They did not need to be concurrent. It is exceedingly improbable that the election provided for by article III. was deferred so long.

If they had so elected there was no longer any contingency or proviso to affect the title of the Railroad Company.

Again we insist that the Railroad Company having contracted and paid for the land by its assignee, the title acquired by the patent related back to the time of the contract, and as to all taking conveyances from them, the title bears date at the time of the contract. 12 How. page 59; 10 How. pages 348 and 373; 1st Peters, 628.

in Kansas. To have done so would have frustrated the purpose of the treaty. The tribe had engaged to quit the State of Kansas. It was possible that individual Indians might prefer a different course. A provision was made in the treaty for this possible preference. It does not appear in the findings of the Court that any Indians accepted the proffered alternative. This provision of which it was improbable that any considerable number of Indians would avail themselves, can hardly be said to destroy the title of the Railroad Company to the allotted lands. Besides this we claim that there is no finding of the Court nor evidence that the individual members of the Delaware tribe had not elected whether to dissolve their relations with the tribe, long before February 21st, 1867. This election and the registry provided for by article IX were separate and distinct transactions. They did not need to be concurrent. It is exceedingly improbable that the election provided for by article III. was deferred so long.

If they had so elected there was no longer any contingency or proviso to affect the title of the Railroad Company.

Again we insist that the Railroad Company having contracted and paid for the land by its assignee, the title acquired by the patent related back to the time of the contract, and as to all taking conveyances from them, the title bears date at the time of the contract. 12 How. page 59; 10 How. pages 348 and 373; 1st Peters, 628.

Stark vs. Starr; 6 Wal. 402; 2 How. 316; 14 How. 313, 524.

2d, The court erred in holding that the deed from the Railroad Company to Simpson was not such a deed as could work an estoppel upon the Railroad Company, and that Simpson acquired no right under it.

The deed purported to "convey, remise, release, and forever quit claim to the said S. N. Simpson, his heirs and assigns forever, all the right, title and interest acquired by the Missouri River Railroad Company under treaty of July 4, 1866, or by Len. T. Smith, as its President, *or that they may hereafter acquire* under or by virtue of said treaty," (Here follows description of the land,) and proceeds, "it being understood that if there are any improvements on the above described lands, to be paid for under the treaty before mentioned, the said Simpson shall pay for the same, and reference is also hereby made to an agreement of the parties of this date, which qualifiedly controls this deed, *and all* estate, title and interest of the said Missouri River Railroad Company, either in law or in equity of, in or to said premises."

Now we insist that the language of this deed, (a portion of which seems to have been overlooked by the Supreme Court,) is sufficient to pass to Simpson by estoppel all right that the Railroad Company might afterwards acquire by virtue of said treaty and contract, and it clearly imports a

covenant that the Railroad Company will not convey any such after acquired rights to any other person.

The deed will be construed according to the true intent of the parties appearing from the deed, however inartificially the same may be drawn. And after a deed like this, an after acquired title will inure to the grantee. (2 Smith's deading Cases, 6th Am. Ed., page 740; Comstock vs. Smith, 12 Pick. 116; Jackson vs. Stevens, 13th Johnson, 329; Washburn on Real Property, vol. 3, 3d Ed., page 91, secs. 19–20; same, pages 97–99; Phillips vs. Kellogg, 15 Ill., page 131.

In the opinion of the Supreme Court in this case, (Transcript of Record, p. 149) the Court says that Caldwell and those claiming under him, by his signature to the contract were estopped to deny the execution of the deed by the Railroad Company to Simpson, and therefore, if (as we think we have shown) the deed was sufficient in terms to estop the Railroad Company, Caldwell and those claiming under him are clearly bound by the estoppel against the Railroad Company, appearing upon the deed, and have no right to claim the land as against Simpson.

Again—It appears from the 2d, 3d and 5th findings of fact by the court, (Transcript of Record p 132) that the lands of said reserve, provided to be sold by said treaty, were paid for by A. Caldwell and his associates, of whom one was said Smith, who executed the deed to Simpson on

the part of the Railroad Company, and the said A. Caldwell, who was Vice-President of said Company, and eight of the Board of Directors, consisting of eleven, were interested in the purchase, so that in truth a majority of the Board of Directors assumed to sell to themselves, and those with whom they were associated, the land of the Railroad Company.

And it also appears by the 5th finding of fact (See Transcript of Record, p 133,) that the plaintiffs, when they made said purchase, knew of Simpson's rights in the premises, and therefore Caldwell and his associates could not acquire by such deed any right to said land as against either the Railroad Company or Simpson. (See 43d Missouri, p 594; 44th Missouri, pp 445, 455: 37th New York, p 317; 38th New York, pp 201,203; Willard's Equity 186, 604, 606, 612.)

DELIVERY OF THE DEED TO SIMPSON.

We have thus far argued the question on the theory that the deed to Simpson was delivered before the title of the Railroad Company was perfected.

But we think such was not the case. The deed of Februrary 21st, 1867, was deposited in escrow to be delivered after the completion of the registration. It was finally delivered in May, 1867, and in June, 1867, Caldwell assented to this delivery. Tenth finding of fact (See Transcript of Record, p 137.) It was therefore not delivered until after the Indians had made their election and the

registration had been completed. It is true, that a deed in escrow relates to the date of deposit, for the purpose of cutting off any intervening conveyances made by the grantor; but we insist that if the Company acquired any title by virtue of the registration, such title inured to the grantee of the deed, *for the deed was to have no validity until after such registration was made*; and because a deed in escrow conveys the estate subsisting at the date of final delivery. (4 Kent Com. 454.) "The deed operates from the second delivery, * * * and is to be considered the deed of the party from that time." (4 Kent Com. 454.) We submit that the Court erred in holding, as in effect it did, that the Railroad Company had no title to these lands at the time of the final delivery of the deed in May, 1867, and when Caldwell assented to such delivery.

COVENANTS OF DEED.

The District Court of Kansas found, that the only consideration of the deed and contract of February 21st, 1867, was the agreement of Simpson to pay for the improvements on said lands. (12th finding of fact, Printed Transcript, p 137.) The Court did not find that the consideration or any part of it was illegal. We claim that the Supreme Court of Kansas committed an oversight, and erred, in holding that there was no consideration.

It appears that the vice-president and directors of the Railroad Company procured an assignment

to be made to themselves by the Company, of the whole Delaware Diminished Reserve, and immediately sold eight thousand acres of these lands, at twenty dollars per acre, for which they paid the Indians but two dollars and fifty cents per acre. The confederates of Caldwell, (one of whom was R. M. Shoemaker,) and those claiming under them, with knowledge of the nature of the transaction, are not in a position to impeach the consideration of Simpson's deed. We are perfectly willing to contrast Simpson's dealings with the Company, with the transactions between Caldwell and his associates and the Company; especially in view of the well established principle, that no officer of the Company could have any dealings with it, in his own behalf, until he had first resigned his position as such officer.

All that can be said against the deed and contract of February 21st, 1867, is, that the consideration thereof was too small. It was good and valuable, but was less than the value of the land conveyed. On the other hand, the assignment of the lands of the Delaware Diminished Reserve was a fraud upon the Company, and was absolutely forbidden by the nature of the relation which the President, Vice-President and Directors sustained to the Company.

It should not be overlooked that the patent in evidence, in effect, conveyed the Delaware lands to the assignee of the Railroad Company. As to the lands in dispute, Simpson was such assignee,

and his rights cannot be defeated by a subsequent and fraudulent assignment procured by Caldwell and his associates.

DEED CAN NOT BE DEFEATED BY DEFENDANTS IN ERROR FOR FRAUD.

If it should be held that the transaction between Caldwell and Smith of the one part, and Simpson of the other, was illegal and fraudulent, then we claim that Caldwell and those deriving title from him, with knowledge of the nature of the transaction, being *particeps criminis*, cannot recover the possession of the land conveyed pursuant to the supposed illegal contract. 1 Smith's Lead'g.Cases,6th Am. Ed.pp 636–39; 2 Smith's Lead'g.Cases, 6th Am. Ed. p 530; Inhabitants of Worcester vs. Eaton, 11 Mass. p 268; Doe et Roberts vs Roberts 2 B. & A. p 367.

The decision of the Supreme Court of Kansas rests wholly on a misconstruction of the treaty and contract made pursuant thereto, and we claim that their judgment should be reversed.

NELSON COBB,
W. W. NEVISON,
S. A. RIGGS,
Att'ys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

WILLIAM A. SIMPSON
vs.
CARLOS S. GREELEY, *et al.* } No. 291.

In error to the Supreme Court of Kansas.

Brief on behalf of Carlos S. Greeley, S. M. Edgell, William M. McPherson, Robert E. Carr, Edward Miller, Mathew Baird, R. M. Shoemaker, J. W. Kenny, partners, as. Shoemaker, Miller & Co., defendants in error.

The above named defendants in error brought their action in the District Court of Leavenworth county, Kansas, to recover the possession of certain lands, together with damages for the detention thereof, and for waste committed thereon by the plaintiff in error and eight other persons, his co-defendants. The petition is set out in the record, p. 21.

The plaintiff in error and his co-defendants filed a joint answer setting up two defenses:

1. Denial of the matters alleged in the complaint except the possession by them of the demanded premises.

2. "A counter claim and cause of action" setting up certain special matters, and praying that, by reason thereof, the plaintiffs be enjoined and restrained from ever claiming, suing for, or setting up title to any part of said premises, and that the estate of the plaintiffs therein be determined and held for naught.—(*Record, pp.* 22, 31.) The plaintiffs below filed their application—(*Do., pp.* 32, 34)—re

and the cause being thus at issue was submitted for trial to the court—(*Do.*, *p.* 37)—who found separately the facts and the conclusions of law arising thereon, and rendered judgment in favor of the plaintiffs.—(*Do.*, *pp.* 130, 140.)

William A. Simpson filed a "petition in error" to the Supreme Court of Kansas, assigning 135 errors.—(*Do.*, *pp.* 4, 19.) He alleges that the consent of the other original defendants, "or of any of them, can not be obtained to join him in this proceeding in error, nor can the consent of any of them be obtained to attempt to reverse any of the judgments, or to prosecute any suit or proceeding therefor." "A summons in error was sued out; the original plaintiffs entered their appearance; the defendants, Acker, Smith, Arbold, Johnston, Barret, Excendine, Leon, and Cockran, entered their appearance—(*Do.*, *p.* 145)—but so far from admitting that their consent could not be obtained in prosecuting a writ of error, they on the 12th of January, 1871, filed their petition, praying that the judgment rendered against them be reversed for the causes and reasons set forth in the petition of Simpson.—(*Do.*, *p.* 19.) The said plaintiffs and the said defendants both appearing, the Supreme Court affirmed the judgment on the 22d day of the following December, and on that date a mandate was issued out of that court to the District Court reciting that a judgment in a certain civil action, wherein *Carlos S. Greeley et al.* were plaintiffs, and *William A. Simpson et al.* were defendants, was rendered by the latter court in favor of the said Carlos S. Greeley *et al.*, on a transcript of which judgment and record said *William A. Simpson et al.* prosecuted a petition in error to the Supreme Court within and for the State of Kansas."—(*Do.*, *p.* 152.)

It is obvious, therefore, that all the original defendants

were plaintiffs in error in the Supreme Court of Kansas. A joint judgment affirming the judgment of the District Court was rendered against them.

William A. Simpson alone prosecutes a writ of error here—(*Do.*, *p.* 4)—and it should be dismissed.—(*Owen vs. Kincannon*, 7 *Peters*, 399; *Deneale vs. Stump*, 8 *Id.*, *p*, 526; *Wilson vs. Life and Fire Insurance Company*, 12 *Id.*, 410; *Williams vs. Bank of the United States* 11, *Wheaton*, 414; *Masterdon vs. Herndon*, 10 *Wallace*, 416.)

The third section of the act to further the advancement of justice, approved January 1, 1872—(*Stat. Feb.* 17, *p.* 196)—authorizes this court, when the defect has not injured, and the amendment will not prejudice the defendant in error, to allow an amendment to a writ of error in certain matters, among others, "when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record and in all other particulars of form." This legislation was evidently designed to relieve parties from the effect of clerical misprisions which had been theretofore considered as fatal, as no amendment to a writ of error was allowed, and the consent of parties could not waive or cure a defect in that process. The statement of the parties to the action is defective, and may, in the discretion of this court, be amended by the record, but the non-joinder of the other defendants in suing out the writ in the absence of a sufficient cause therefor is not within the scope of the statute, and the authority of the cases above cited is conclusive.

A citation without service is equivalent to no citation. It may be served upon the attorney of record—(*Bacon et al. vs. Hart*, 1 *Black*, 38.) The only service here was upon the attorneys of record of the original plaintiffs. Our appearance here is only on behalf of them, and their

interests are directly in conflict with those of the parties who, by this writ, are improperly joined with them as defendants in error. As the citation therefore has not been served pursuant to the judiciary act, and as there is no general appearance or consent to cure the defect, the cause should be dismissed.

We submit that these pleadings do not present a case where is drawn in question any matter which is re-examinable in this court upon a writ of error to a State court.

The treaty of July 4, 1860, with the Delaware Indians —(*Stat.*, *vol.* 14, *p.* 793)—provided for the sale of certain lands belonging to them. A registration of such members of the tribe as might elect, free from all restraint, to dissolve their tribal relations and become citizens of the United States, was required by the third and ninth articles, and the lands of such members and those of their minor children, held by them in severalty, were to be reserved from sale. Whenever it was ascertained by the registry what lands would be vacated there was to be set apart from the lands held in common land for each child of Delaware blood, born since the previous allotment of land to the members of the tribe in severalty. The sixth article provides for the distribution of the proceeds of the sale of the unallotted and the vacated lands. The seventh and eighth articles provide for the sale of such lands, and for the issue of patents to the purchaser, or his or its assigns. Pursuant to its provisions, the Secretary of the Interior, August 31, 1866, entered into a contract with the Missouri River Railroad Company for the sale of the lands, "subject to all the terms, exceptions, conditions, and limitations in said treaty mentioned."—(*Record*, *p.* 23.) The company assigned its right of purchase to Alexander Caldwell, who paid the purchase money and received a patent bearing date October 26, 1867, for sundry tracts of

land embracing that in controversy.—(*Record*, *p.* 38.) Said Caldwell and wife, by deed bearing date December 26, 1870—(*Do.*, *p.* 39)—conveyed the lands to the plaintiffs in the District Court, who thus showed a clear *prima facie* right to recover.

The second defense of the defendants in the District Court is in the nature of a bill in chancery, and they in reference to the equities upon which they rely, become complainants. If they possess a superior equity, which a court of chancery would enforce by decreeing the transfer of the legal title, or by enjoining the party holding it from asserting it, they may, in Kansas, set up such equity in an action brought against them for the recovery of the land, and the court is empowerd to grant them relief. The defense was that the lands in controversy are parcels of the lands mentioned in the treaty; that the Secretary of the Interior, within the required time, notified the Missouri River Railroad Company that he was authorized to contract with them, or other responsible party, for the sale of those lands; that the company elected to purchase, and entered into a contract with the Secretary; that the company duly paid for the lands; and that on the 21st day of February, 1867, "by its president and agent in that behalf, duly authorized and empowered, made, executed, and delivered to Samuel N. Simpson" a deed for the lands in controversy, which is set out in the defense; that at the same time said company, by L. T. Smith, its president and agent in that behalf duly authorized and empowered one Alexander Caldwell, by the name and description of A. Caldwell, vice president, and the said Samuel N. Simpson, made and executed their written instrument of that date, sealed with the seal of said company, and said instrument is out; that said Samuel N. Simpson, May 28,

1867, conveyed by his deed of that date the land in controversy to William A. Simpson, which was filed for record in the recorder's office of the county, May 31, 1867. Said deed is set out; that Samuel N. Simpson immediately after the execution of the deed to him by the company took possession of the land, and made valuable improvements thereon; that William A. Simpson, after said Samuel's deed to him, took possession of the land, and made improvements thereon; that the Indians theretofore living thereon elected to remain members of the tribe, and gave up possession of the lands; that he tendered to the company and to said Caldwell the value of the improvements; that Caldwell and others, his confederates, combined to cheat him out of the land, and without right induced and procured the officers of the United States to issue to said Caldwell a patent for the lands in the contract mentioned; that said Caldwell by deed pretended to convey said lands to the plaintiffs, who paid no consideration therefor, and took title with a full knowledge of William A. Simpson's rights; that Caldwell made the deed to get rid of his contract with Samuel N. Simpson.

The plaintiffs, in their replication, admit the execution of the contract with the Secretary of the Interior. They deny that Smith and Caldwell, or either of them, was authorized by the railroad company to execute in its behalf the deed and agreement set forth in defendant's plea. They admit the execution of the deed from Samuel N. Simpson to William A. Simpson, but allege that the same was made without any consideration, and for the purpose of complicating the title to the lands in controversy. They admit the issue of the patent and the execution of the deed by Caldwell and wife to them. They allege that there was no consideration for the pretended deed and agreement of

the Missouri Railroad Company to Simpson; that on the 29th day of October, 1866, they entered into an agreement with said Caldwell for certain lands, which agreement is set out and that the lands in controversy are a part of the lands in said agreement mentioned; that they paid for said lands at the rate of $20 per acre; that at the date of said agreement they knew nothing about the pretended deed and agreement of February 21,1867, and that at said last date, and for a long time thereafter, the lands in controversy were occupied by various members of the tribe, and they deny every other allegation in the answer not specifically admitted, except that the defendants were in possession of the lands in controversy at the commencement of the suit. It will thus be seen that the execution of the contract by the Secretary of the Interior and the Missouri River Railroad Company, the issue of the patent to Alexander Caldwell, his deed to the plaintiffs, the deed of Samuel N. Simpson to William A. Simpson, and the fact that the lands were situate within the reservation mentioned in the treaty, are admitted. The issues raised by the pleadings relate to the asserted execution by the railroad company of the deed and agreement, both bearing date February 21, 1867, the entire want of any good or valuable consideration therefor and for the deed of Samuel N. Simpson to William A. Simpson; the payment of the purchase money by the company for the patented lands; the possession of the lands in controversy by members of the tribe, who, February 21, 1867, had not then elected to remove therefrom, and the alleged fraudulent conspiracy to cheat and defraud William A. Simpson.

The conclusions of fact found by the District Court are that the patent was issued to Caldwell; that the railway company did not pay for any of said lands, but that Cald-

well did pay therefor and for the improvements thereon; that Caldwell and wife conveyed by deed, bearing date December 26, 1870, certain lands, embracing those in controversy, to the plaintiffs, who paid therefor $20 per acre; that on the 26th of February, 1867, the Indians were assembled on their reservation with Pratt, their agent. Smith, Caldwell, and Samuel N. Simpson were also there. The object of the meeting was to secure the registration required by the treaty. Smith and Caldwell came at the request of the agent. Samuel N. Simpson was there without invitation from any officer of the Government and solely with a view to promote his own interests. He had spent a portion of the previous day with influential members of the tribe and the evening with Johnnycake, one of the chiefs, and was laboring to dissuade the Indians from registering. Such was his influence with them that he did control their action and prevented their registration, although the agent desired them to proceed with it.

He was requested to withdraw his opposition, but he refused to do so unless the railroad company would donate him a section of lands authorized to be sold by the treaty. Whereupon, in order that all opposition to the registration should cease, Caldwell and Smith promised him that the railroad company should comply with his demands and exactions, and donate him a section of lands not including any improvements thereon; and thereupon Smith, pretending to act on behalf of the railroad company, executed the deed to Samuel N. Simpson, bearing date February 21st, 1867, and at the same time Smith and Caldwell executed the agreement with said Simpson. Neither Smith nor Caldwell was authorized by the company to execute either instrument, or to dispose of said lands, and the attempted disposition of them was never ratified by the company.

The deed and agreement were deposited with Robert Crozier, Esq., to be delivered to Simpson should there be no further difficulty in proceeding with the registration of the Indians. Simpson then abandoned all further opposition to registration, and in June, 1867, the papers were, with the assent of Caldwell, delivered to Simpson.

No consideration whatever, not even the dollar mentioned in the deed, was ever had or received by the railway company, or by Smith and Caldwell, or either of them, for said deed and agreement, except such consideration as the facts and circumstances attending their execution make out.

The deed made by Samuel N. Simpson to William A. Simpson was without any consideration, and the latter was fully aware of all the facts and circumstances connected with the execution of the deed and the agreement with the former, and was acting in collusion with him to complicate the title to the land. The land mentioned in the deed and agreement was, at their date and until the spring of 1868, occupied by some of the Delaware Indians, who had made improvements thereon prior to the treaty. In the fall of 1867 said William A. Simpson tendered to Smith, for the railroad company, and to Caldwell the value of the improvements. They refused it. Smith was not then the treasurer of the company.

The rental value of the land and the damages arising from the waste committed were found by the court, who decided that the plaintiffs had the legal title, and were entitled to the possession, and that the defendants were not entitled to any relief on the claim of right and title set up by them.

The title to relief set up is substantially that the railroad company released and quit-claimed the premises to Samuel

N. Simpson for a valuable consideration, and bound itself by an agreement to use the same diligence to obtain a good title to them as to the other lands subject to sale under the treaty; that she paid the United States the full stipulated consideration for the lands she had covenanted to purchase, and then corruptly agreed and confederated with Caldwell and others to induce the officers of the United States to issue a patent to Caldwell, who conveyed the premises to the plaintiffs. The latter had full notice of Simpson's equities, and therefore held the title as a trustee for him.

The alleged equities of Simpson, as shown by his defense, raise no federal question, and are in no way dependent upon the construction of the treaty. They grow out of the transactions of the parties, and must be measured and determined by the law applicable to them. This court can not, however, review the judgment, unless the federal question was not only presented and decided adversely to the plaintiff in error here, but was so necessarily involved that the State court could not have given a judgment without passing upon it. If, therefore, the construction of the treaty had been drawn in question by the defendants, and a decision given against their title, this would not be sufficient to give jurisdiction here, unless their title *depended* on the treaty. If the judgment of a State court can be sustained on other grounds, this court will not revise it, although a federal question might have been decided erroneously.—(*Crowell vs. Randall*, 10 *Peters*, 368; *Parmelee vs. Laurence*, 12 *Wheaton*, 117; *Williams vs. Norris*, 11 *Wallace*, 36; *Rector vs. Ashley*, 6 *Wallace*, 142; *Klinger vs. Missouri*, 13 *Wallace*, 257.)

Again, the conclusions of fact found by the District Court are incorporated in the record and form a legiti-

mate part of it. As above stated, they negative all the essential allegations of the defense. The non-execution by the company of the deed, and of the agreement with Simpson, and the absence of any good or valuable consideration to either instrument are specifically set forth. The payment of the purchase money for the lands covered by the patent from the United States to Caldwell was made by him, and not by the company or with its funds, and the patent was, in accordance with the contract, issued to him as the assignee of the company. It then becomes wholly immaterial to inquire what rights, if any, were vested in the company February 21, 1867, under its contract with the Secretary of the Interior. Considering the special defense, therefore, as an application to the equitable powers of the court, and conceding for the purposes of argument that it presented a case justifying the exercise of them, it was properly dismissed, and the relief prayed for denied, as the case thereby made was not sustained by the proofs, and the title of Simpson to relief was inherently and fatally defective by reason of its fraud and illegality. A court of equity or one exercising equitable powers must always be satisfied that the claim is fair, just, and reasonable, and the contract founded on an adequate consideration, or it will withhold the relief prayed for, and leave the party to his remedy at law.—(12 *Vesey*, 331.)

The conclusions of law announced by the District Court, or which arise upon the proofs, do not directly or incidentally, involve a federal question.

The opinion of the Supreme Court of Kansas is attached to the record, conformably to the amended eighth rule of this court, promulgated April 28, 1873, but it can not be resorted to for the purpose of showing that a question of federal cognizance was decided by the State

est" which, February 21, 1867, the company had in the demanded premises.

We submit that the company, under the contract with the Secretary of the Interior pursuant to the provisions of the treaty, had no interest in or title either equitable or legal to the premises—no *jus in re* or *jus ad rem*. They could not have entered upon an inch of the lands without being guilty of a trespass. The whole reservation had been "conveyed and forever secured by the United States to the Delaware nation as their permanent residence" by the supplementary treaty of September 24, 1829, so that not only the possessory right but the ultimate fee simple was vested in them. The tract now in controversy had been allotted to certain members of the tribe, who, prior to the treaty, had made improvements thereon. Now, until a registration of the Indians took place it was impossible to tell whether the occupants of the tract would vacate it, and the company's right of purchase attach. If the occupants of it elected to hold in severalty and become citizens they were entitled to receive a patent in fee simple, with the power of alienation. The registration was the only mode for ascertaining and segregating the lands that might be sold in the event of the occupants thereof maintaining their tribal relations, vacating their lands, and removing to the Indian country. Without a registration the treaty must have remained a dead letter, and with it the lands in controversy might have been retained by the allottees had they elected to become citizens. Indeed, the whole reservation might have been withheld from sale if the Indians had all so elected. To state the company's right, under the contract, in the most favorable light for them, it was nothing more than a possible right to purchase an indefinite quantity of land, depend-

ent upon contingencies and conditions that might never happen, and none of which had happened at the date of the deed in question. Upon their happening, the company would not acquire any vested or transferable interest in any specific tract before paying the appraised value of the improvements and the purchase money of the ten thousand acres in which it was included. The Supreme Court of Kansas holds that the company, at the date of the deed, could make no legal conveyance of the land. The citation of cases in their opinion fully supports that obvious proposition.

Neither the company nor Caldwell had any transferrable interest in the land at the date of the deed. Indeed, the company acquired none at any subsequent date, as her right of purchase was assigned to Caldwell shortly before he paid the purchase money and received a patent. If the company had made an executory contract and thereafter acquired a title, the Supreme Court very properly holds that there was no consideration for the contract set out in the defense, and that no court could find any equity in it or enforce it.

W. T. OTTO,
Att'y for Shoemaker, Miller & Co.

Supreme Court of the United States.

In Error from the Supreme Court of the State of Kansas.

WILLIAM A. SIMPSON, *Plaintiff in Error*,
vs.
C. S. GREELEY and others, *Defendants in Error*.

Argument of J. P. USHER for Defendants in Error.

J. P. USHER,
Attorney for Defendants in Error.

Supreme Court of the United States.

In Error from the Supreme Court of the State of Kansas.

WILLIAM A. SIMPSON, *Plaintiff in Error,*

vs.

C. S. GREELEY and others, *Defendants in Error.*

Argument of J. P. Usher, for Defendants in Error.

Preliminary to the discussion of the questions sought to be presented for the decision of this Court, we call attention to the following irregularity:

The writ of error in this case is a writ by William A. Simpson, the present plaintiff in error, against the plaintiffs in the original suit in the District Court of Leavenworth county, Kansas, and the co-defendants against Simpson in that Court. Simpson alleged in his petition in error, filed in the Supreme Court of Kansas, that the consent of his co-defendants, Ackers, Smith, Arbold, and others, could not be obtained to join with him in the writ of error in that Court; but that averment is by the record found to be untrue, for on page 19 it will be seen that they did appear, and joined in the petition in error, and prayed that the judgment might be reversed, and on page 146 it appears that the judgment was affirmed with costs, so that by the record it appears that all the defendants in the Court below joined in the petition in error for reversal, and the judgment was affirmed against all of said defendants. We submit that all of the defendants should have joined in prosecuting the writ of

error in this Court, or if one or more of them refused to join Simpson their refusal should appear of record; so far from that Simpson in the assignment of errors, as well as in the writ and citation, proceeds against his co-defendants without distinguishing them from the plaintiffs in the Court below. – Mr. Nevison, attorney for Simpson, makes an affidavit (page 3) that he had served the citation upon Thomas Fenlon and R. Crozier, attorneys of record for the within named defendants in error. The record shows that Messrs. Fenlon and Crozier were not the attorneys of the co-defendants of Simpson; on the contrary, they were the attorneys of the adverse parties. Griswold & Britton were the attorneys of Ackers, Smith, and other co-defendants of Simpson. (Record, p 19). We submit that the cause is not regularly in Court, and ask on behalf of C. S. Greeley and his co-plaintiffs in the Leavenworth District Court, that the cause be dismissed by this Court because of such irregularity.

If we are mistaken in this contention, and our objection to the regularity of the proceedings be over ruled, then we further submit that by the decision of the Supreme Court of Kansas there was not drawn in question the construction of a treaty or statute of the United States, and a decision by that Court against the right, title and authority, specially set up and claimed by the plaintiff in error under any such treaty or statute.

Greeley and others in the District Court below, by their petition, alleged that they had the legal estate in, and were seized in fee simple of certain lands, describing them. (Record, p. 21).

Upon the trial the plaintiffs offered in evidence a patent from the United States to Alexander Caldwell (pages 38 and 39), also a deed from Caldwell and wife to the original plaintiffs for the lands in controversy. (Pages 39, 40, 41 and 42 of the record). These docu-

ments established the fee simple title of the lands in controversy in Greeley and his co-plaintiffs. Against this title, Simpson and his co-defendants, by way of counter claim, alleged that the United States had entered into an agreement with the Missouri River Railroad Company to sell to that company the lands of the Delaware Indians, subject to all the terms, exceptions, conditions and limitations contained in the treaty of the 4th of July, 1866, between the United States and the Delaware tribe of Indians. The contract is set out on pages 23 and 24 of the record; it is clearly an executory contract, an agreement to sell upon the terms, exceptions, conditions and limitations of the treaty. On page 24 the defendants aver that the railroad company duly paid for the lands. This allegation is denied by the plaintiffs (page 34), and on page 44 Caldwell swears that he paid the money to the United States about the middle of October, 1867, and the Judge so found by his finding (record, p. 132). Simpson sets up title under a deed made by one Samuel N. Simpson, to him, on the 28th day of May, 1867. This deed is found to be a fraud by the Judge who tried the cause. (Record, page 138, 16th finding).

It was further alleged by Simpson and his co-defendants that the Missouri River Railroad Company had executed a quit claim deed of the lands in controversy to the said S. N. Simpson, on the 21st day of February, 1867.

By the eleventh finding of the Court, page 137, it was found that this deed was made without any authority from the railroad company, and by the twelfth finding that it was without "*consideration of any sort or kind.*"

Simpson and his co-defendants also alleged (record page 26) that the railroad company, by L. T. Smith, its president and agent in that behalf duly authorized, and Alexander Caldwell, executed their certain written

instrument dated the 21st day of February, 1867, by which it was recited that the railroad company had that day, for a valuable consideration, "made a deed for the following described lands" (specifying the lands in controversy). This agreement goes on to say among other things, that if the railroad company should not obtain a patent for any tract described in the deed, they agreeing to use the same diligence to obtain title to the lands conveyed by the company that was used by the company to obtain title to other lands purchased by them under the contract of purchase of the Delaware Diminished Reserve, pursuant to the terms of the treaty of July the 4th, 1866, the company would allow S. N. Simpson to select other of said lands equal in amount to the number of acres mentioned in the deed, for which the company shall not acquire title; and the company would convey such lands by good and valid deed to him, S. N. Simpson. The instrument then continues thus: "In the event of the failure of title, the deed this day made of lands to which said company has or shall obtain no title, shall be void; and the said company agree to give the said Simpson a choice of any lands to which they shall acquire title to, not then sold under such contract of purchase, and to convey such lands in lieu of and to an equal amount to the lands described in a deed of this date, to which the title of the company shall fail. And the said Leonard T. Smith, President, and Alexander Caldwell vice President of said company, for and in consideration of the premises aforesaid, for themselves jointly and severally, covenant and agree with the said Simpson that this agreement shall be well and truly kept by the said railroad company." (Record, page 26).

The plaintiffs replied denying that this agreement was made by authority of the railroad company (record, page 32), and the District Court found (page

137, eleventh finding) that the agreement was made without authority from the railroad company, and (in the twelfth finding) that it was made without consideration.

The defendants by their counter claim and answer prayed that the "plaintiffs be enjoined and restrained from ever claiming, sueing for or setting up title to said several tracts of land, or any or either of them, or any part or portion thereof, and that the pretended estate and interest of said plaintiffs and each of them therein, be determined and wholly for naught held." (Record, page 31).

It is believed that the foregoing statement will be found to embrace all the facts to be gathered from the record showing or tending to show the right and claims of the respective parties to the lands in controversy. The plaintiffs in the Leavenworth District Court, as appears by the record, had the legal title founded on the patent to Caldwell, executed on the 26th day of October, 1867, and the deed of Caldwell and wife executed to the plaintiffs in that Court on the 26th day of December, 1870. Simpson and his co-defendants endeavored to maintain their possession solely by virtue of the void deed purporting to have been made by the Missouri River Railroad Company on the 21st of February, 1867.

This deed by the Kansas Courts has been adjudged to be void, and it is not pretended that the judgment of those Courts on that question is subject to be reviewed by this Court, and the case would end here but for the fact that by the decision of the Supreme Court of Kansas the concurrent contract of Caldwell and Smith, wherein it is recited that the corporation had that day executed a deed to Simpson for the lands in controversy, estopped Greeley and others, grantees of Caldwell to deny the execution of the deed by the corporation.

In this, we submit the Supreme Court of Kansas erred. The twelfth finding of the District Court is that "no consideration of any sort or kind" was "ever had or received by said L. T. Smith or Caldwell from said S. N. Simpson, or from any one else," save and except the promise to give Simpson the land if he would forego his opposition and allow the Delawares to register under the treaty. The conduct of S. N. Simpson on the 21st of February, 1867, in interfering with and preventing the registration, is detailed in the ninth finding of the Court (record, page 134). The attention of the Court to this finding is requested. Words are inadequate to characterize the baseness of his actions.

The Courts of Kansas having found and decreed that the contract of Caldwell was without consideration, we submit that an estoppel cannot be based upon it. The agreement was void and no estoppel can be founded upon it. *Doe. Ex. dem.*, *Stevens* vs. *Hays*, 1 *Ind.*, 247; *Housatonic Bank* vs. *Martin*, 1 *Met.*, 294, 309; *Jackson* vs. *Brinckerhoff*, 3d *John*, *Cases* 101.

It is found to have been procured by fraud, and at folio 268 the Supreme Court says, "*There was no consideration; the inducements to make the deed were inherently vicious.*"

A deed procured by fraud works no estoppel. *Hazzard* vs. *Irwin*, 18 *Pick.*, 95; *Partridge* vs. *Messer*, 14 *Gray*, 180.

Moreover, the defense was not based upon the contract of Smith and Caldwell, but upon the alleged deed of the corporation wholly collateral to the contract. In such case there is no estoppel. *Carpenter* vs. *Buller*, 8 *Mees. & W.*, 209. See *Wilcox* vs. *Howell*, 44 *N. Y.*, 398.

It does not matter that the Supreme Court of Kansas supposed the contract created an estoppel which made it necessary to examine, and construe the treaty, if

in fact that Court erred in that conclusion there is no question for this Court. The opinion of the Supreme Court is no part of the record.

The defendants in error maintain that by the special finding of the District Court, the plaintiffs in error below, Simpson and others, did not offer any evidence which made it necessary for the Court to consider the treaty of the United States with the Delawares; and if they are not mistaken in this the judgment must be affirmed. The case falls within the rule laid down in *Gibson* vs. *Choteau*, 8 *Wall.*, 314, that "Where there are other questions in the record, on which the judgment of the State Court might have rested, independently of the federal question, this Court cannot reverse the judgment."

But if the defendants here, are mistaken, and it becomes necessary to consider the treaty, then we urge that the Court did not err in the construction given it.

By the ninth finding of the Court (folio 209), it is established that the Delawares were assembled at their agency, on their reservation, on the 21st of February, 1867, for the purpose of electing whether they would permit the Secretary of the Interior to sell their lands, as by the treaty it was provided. Their will was to be ascertained by a registry, which the Secretary was, by the third article of the treaty, required to have taken, and to be freely made by the Delawares, without interference by any one. In electing whether they would become citizens of the United States they were to be "*free from all restraints.*" At this time the lands in controversy were occupied by the Indians, this is conclusively proven by S. N. Simpson. (See record, pages 98–9). He proved that the Chief, Sarcoxie, and his son with their families, were residing on the land in controversy. That it was the headquarters of this chief, and that Beaver, another of the Delawares, had an improvement on the land, and had a tenant in pos-

session. It is clear that if these Indians did not register and agree to the sale, the Secretary had no authority to sell to the railroad company; and as the matter then was, the title, or rather the right of occupancy was in the Delawares, and the railroad company had at most, but the possibility of acquiring the title. This branch of the case is so well and clearly stated by the Chief Justice of the Supreme Court of Kansas, that we beg leave to refer to his opinion for the law and the grounds of his enunciation of it.

The contract of purchase executed between the Secretary of the Interior and the railroad company on the 31st day of August, 1866, was an executory agreement to sell the lands of the Delawares, and was not an absolute sale, and by the terms of the agreement the Secretary was not bound to sell unless the railroad company paid the money within sixty days of the date of the contract for the price and value of all the unallotted lands, and should pay for the other lands and improvements as they should be from time to time found to be the subject of sale. The contract does not purport to be a sale of these particular lands, but an agreement to sell them. Whether these lands might or might not be included in the agreement to sell depended upon acts yet to be done and resolves to be made by the Delawares in respect to vacating said lands, over which acts and resolves the Secretary did not have any control. By the very terms of the contract the railroad company did not acquire any present interest in the lands in controversy. We submit that the contract executed by the Secretary was only an agreement to sell upon the happening of certain events and upon certain contingencies, vesting no immediate interest in the railroad company, and that if the deed to Simpson of the 21st of February, 1867, had been the genuine deed of the company, the company had then by virtue of its ex-

ecutory contract, no right, title or interest in these particular lands. The alleged deed was only a quit claim, and made before registry by the Delawares, which necessarily had to precede the action of the Secretary in notifying the railroad company "that 10,000 acres or more of said lands had been vacated by said Indians." The company had no right to convey said lands, and the deed, even if genuine, was a nullity. Both Kansas Courts decreed the deed to be void. Upon the decision of those Courts upon that question, it is submitted this Court will not enter into judgment. Whether right or wrong, the decision must stand.

But if this Court could review the decisions of those Courts upon that question, no harm would result to the defendants here, for the correctness of their decision is indisputable. Since, however, such judgment of the Court cannot be reviewed, we repeat, that the construction of the treaty did not properly become the subject of consideration with the Kansas Courts. The case stopped short of that.

It only remains for me to say that it is apparent the writ of error in this cause was vexatiously prosecuted, and the Court is asked to assess such damages as has been usual in similar cases.

J. P. USHER,

Attorney for Defendants in Error.